UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,
vs.
William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, and Frank W. Kettenbach,
Appellees.

No. 2209

THE UNITED STATES OF AMERICA,
Appellant,
vs.
William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, a Corporation, The Lewiston National Bank, a Corporation, The Clearwater Timber Company, a Corporation, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer,
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No. 2210

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No. 2211

BRIEF OF RESPONDENTS

PEYTON GORDON,
Attorney for Appellants.
GEORGE W. TANNAHILL,
Attorney for Appellees.
For whom he appears.

Appeals from the District Court of the United States for the District of Idaho, Central Division.

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STATEMENT.

These several actions were tried at one and the same time under an agreement that the evidence in support of the particular entries involved might be applied to the particular entries referred to in the

different bills, and a decision rendered based upon the evidence the same as if the evidence in each particular case had been taken at separate times, and repeated in the various actions. This agreement was made in the lower court for the purpose of avoiding repetition of the evidence and the enlargement of the record.

A fair statement of the facts appears in the decision of the Honorable Frank S. Dietrich, who tried the cases (Vol. 1, pp. 256 to 365 of Record), and we feel that we could add but little to the comment of the learned trial court in that opinion. The Court will observe that the trial court in its opinion took each individual entry and considered the evidence and the law as it applied to the same.

The three actions are based upon practically the same state of facts and the reason for filing the separate actions was for the purpose of making other subsequent purchasers parties, and adjudicating the rights of the various claimants. The various bills in equity charge the acquisition of land in violation of the criminal statute, and by conspiracy, fraud, collusion and agreements with the various entrymen.

We will first call the Court's attention to amended bill in equity No. 388 (Page 329 of Record).

There was stricken from this bill all of paragraph two. Paragraph three charges conspiracy by William F. Kettenbach, George H. Kester, William Dwyer, Clarence W. Robnett and Frank W. Kettenbach, and the various entrymen, and charges in substance:

> "That the said defendants did unlawfully, corruptly, combine, conspire, confederate and agree together with each other, and with divers other persons, some of whom are hereinafter named, and others of whom are to the complainant unknown, and did form, make and enter into an unlawful, corrupt and fraudulent conspiracy, combination and agreement with each other, and with other persons aforesaid for the purpose and to the end of defrauding the complainant of the title and ownership of diverse large tracts of public land then owned by the Complainant. * * * "

This is substantially the charge made in each of the bills, and as we understand the rule, fraud must be proved in relation to each and every entry, and that the defendants, George H. Kester, William F. Kettenbach, and William Dwyer, participated in the fraudulent conspiracy by means of which the land was acquired. Paragraph nine sets forth the names of the various entrymen, and the description of the land, and in order to correctly determine whether or not fraud existed in relation to the vari-

ous entries, it will be necessary to refer to the evidence in support of such entries.

We are not unmindful of the contention of the Government that the Timber and Stone law limits the amount of land which an individual can acquire thereunder to 160 acres, and by reasons of the fact that the defendants have acquired more than 160 acres they have acquired the same in violation of the Timber and Stone act. This contention is untenable, and in violation of not only the decision of this court in United States vs. Barber Lumber Co. and others, 194 Fed., p. 24, but also the case of

> St. Louis Smelting & Refin. Co. vs. Thomas F. Kemp, 104 U. S. 636-657; 26 L. Ed. 875-882.

In the last mentioned case, on page 880 the court says:

> "It authorized the issue of patents for claims on veins or lodes of quartz or other 'rock in place' bearing gold, silver, cinnabar or copper. Placer claims first became the subject of regulation by the Mining Act of July 9th, 1870, which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The Mining Act of May 10th, 1872, 17 Stat. at L., 91,

declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are reenacted in the Revised Statutes, Secs. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. * * *

"In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the condition of certain annual expenditures upon them in labor or improvements."

This decision seems to be very much in point. The Timber and Stone law prohibited the making of more than one timber and stone entry of 160 acres, but there is no prohibition of the amount one individual may purchase. He may acquire by purchase all of the claims he can pay for.

In line with these decisions is the case of

Williamson vs. United States, 207 U. S., 425;

United States vs. Budd, 144 U. S., 154;

United States vs. Detroit Lumber Co., 200 U. S. 321;

United States vs. Clark, 200 U. S. 601.

THE EVIDENCE.

We now call the court's attention to the following entries and the evidence of the Government in support of its contentions, omitting for the time being any reference to the evidence on the part of the defendants or of the defendants themselves.

CARRIE D. MARRIS.

We first call the Court's attention to the claim of CARRIE D. MARIS. The evidence is found at pages 2069 to 2084, direct examination, and pages 2084 to 2090, cross-examination. The witness on page 2070 identifies her application to purchase, the non-mineral affidavit, the sworn statement, and the cross-examination taken at the time of making her final proof, and the various other papers in support of her entry. She also testified at page 2071 that at the time she made her entry she was a clerk in a dry-goods store; that Clarence W. Robnett first spoke to her about taking up a claim; and on page 2072 the witness testifies:

"A. Well, he told me it wasn't necessary for me to have the money. Well, I told him I didn't see how I could get it, and he went on to explain that if I went out and took it up, that he would furnish all the expense money, find me a purchaser; that when I had proved up on the claims he would find a buyer, and then the expense money was to be taken out of what I got for the claim, and the profits were to be divided half between himself and myself."

The witness also testifies that Robnett furnished her the money with which to pay her expenses for publication fees, and for the purchase of the land. On page 2079 the witness answers in reply to a leading question by counsel for the Government as follows:

"Q. Now, when you took up this land, Mrs. Rexford, did you understand that you were to convey it to whoever Robnett told you to, and he was to divide it?

A. Well he said he would find a purchaser."

A fair inference from the witness direct examination is that she took up the land, and Robnett was to find a purchaser for it. The witness testifies on cross-examination, beginning at page 2084, that she does not remember of signing any instrument to Mrs. Sullivan, notwithstanding there was a mortgage to Mrs. Sullivan. The evidence shows clearly that Robnett borrowed the money from Mrs. Sullivan with which to make final proof. The witness

did not deed the land to Robnett until immediately prior to her marriage. On page 2085 the witness testifies:

> "Q. Now, after you made your final proof, you held the land how long before you finally deeded it to Mr. Robnett?
>
> A. I deeded it to him on the 2nd of June, along late in the afternoon, and I was married the next day. I was married on the 3rd of June, and I deeded it to him on the 2nd of June, 1903.
>
> Q. And you made your final proof November 22, 1902."

The witness also testifies on pages 2085 and 2086 that she frequently talked with Clarence W. Robnett in the meantime about selling the land, At page 2085 the witness answers:

> "A. Ofttimes, yes, and he would keep me thinking that in just a day or two, or a few days or a week, he would have a buyer for it. I even sat in that room, office in the bank, while he telephoned. I didn't know who to, but he made me think he was talking to a man in Moscow; to a man that was just ready to purchase the land; and when I left the office that day, I thought I would have my money in a very few days. He was talking over long distance, and I listened to the conversation."

On page 2087 the witness testifies that she never knew the land was sold to Kester and Kettenbach; and on page 2088 she testified that she never knew that Robnett sold the land at all, and on page 2086

the witness testifies that she never got a cent after she was married. It seems that Robnett even sold the land and did not pay the entrywoman what he had agreed to pay her for the same. On page 2089 the witness testifies:

> "Q. Now, at any of these times when you entered the bank to see Robnett, you had no conversation with Kester or Kettenbach?
>
> A. Never. Clarence Robnett is the only one I ever had any dealings with at all.
>
> Q. You never had any agreement or understanding that you would sell your land to Kester and Kettenbach?
>
> A. Never. That was never mentioned; as to who were the buyers he never mentioned except the once when I supposed he was talking to Mossow, then he told me that a man by the name of Nat Brown was the buyer. That was the only name that he ever mentioned as a purchaser—no, I believe there was a lumber company, but I don't believe I remember who the company was—some company, anyhow—but the only individual he mentioned was a man by the name of Nat Brown, and I supposed he was talking to him when I overheard that conversation over the telephone in the bank. * * *
>
> Q. In fact, you had no definite agreement to sell your land before you made your final proof, did you?
>
> A. Well, now, the first time he offered me the proposition to take this claim he told me he would go ahead and see to the selling of it, and I would have no more trouble, and all I would be required to do would be to take the land and prove up on it, and he would see to the rest.

Q. He would find you a buyer?

A. Find a buyer and sell it for me, and he would divide the profits; that was thoroughly understood then.

Q. And there was no name mentioned as to who you should deed it to?

A. No, there wasn't.

Q. And there was nothing said about you deeding it to anyone?

A. No, there wasn't."

On page 2521 of the record appears the affidavit of Clarence W. Robnett in relation to this entry, a portion of the affidavit being as follows:

"That the said George H. Kester and William F. Kettenbach knew nothing about the land, or the acquiring of the same by the said Carrie D. Maris for more than a year after final proof was made, and was only a very short time after affiant opened negotiations with the said George H. Kester and William F. Kettenbach for the purchase of the land before the sale was made.

That no agreement of any kind or nature existed between affiant and said George H. Kester and William F. Kettenbach, or between affiant and the said Carrie D. Maris for the purchase of the land prior to the time the sworn statement was filed or prior to the time final proof was made, and no agreement of any kind or nature ever existed betweeen George H. Kester or William F. Kettenbach and the said Carrie D. Maris to the knowledge of affiant prior to the time final proof was made for said tract.

C. W. ROBNETT."

Subscribed and sworn to, July 1, 1909.

The affidavit is set out in full at pages 2521 to 2524 inclusive.

The defendants, Kester, Kettenbach and Dwyer, also testified that no agreement to purchase the tract of land was ever made prior to the time of final proof and that no negotiations for the purchase of the same were begun until more than a year after final proof was made; that the land was purchased in the usual course of business and a valuable consideration paid therefore, to-wit, the sum of $1,600. It occurs to us that if such evidence as this will not protect an entry, it is hard to conceive of a circumstance where an entry could not be cancelled in case it is attacked for any purpose.

On page 3333 the defendant, William Dwyer, testifies that he cruised the Carrie DeMaris claim. And he further testifies as follows:

> "Q. How did you come to cruise it?
>
> A. A couple of years or three years ago I think I was in Pierce and I got a long distance call, and Mr. Kester asked me if I would go and cruise a piece of land over on Reed's Creek, over in Section 12, and I told him I would, I guess. * * * And so a few days later he called me up at Pierce and told me to go and look at that claim, and so I did; and when I came back Mr. Kester told me he had bought it; and that is all I know about the Carrie D. Maris claim."

He also testifies that he had nothing to do with her filing upon the claim or with purchasing it or the final proof.

JOHN H. LITTLE.

The evidence of John H. Little appears at pages 1609 to 1623, direct examination. and 1623 to 1627 cross-examination. It is charged that the entry of John H. Little was fraudulent in that an agreement existed prior to the filing of the sworn statement whereby the defendants George H. Kester and William F. Kettenbach and C. W. Robnett should acquire title to this tract of land. It is necessary to refer briefly to the evidence of John H. Little in relation to his acquiring title to the land. On page 1616 the witness testifies that the first agreement was that Robnett was to procure the money from Curtis Thatcher for the purpose of paying the purchase price and the necessary expenses; that Curtis Thatcher was unable to go through with the deal and Robnett had to make other arrangements for the money. This is in corroboration of the evidence of Mr. Kester wherein Mr. Kester testified that Robnett came to him on the day final proof was to be made and applied to him for the loan for the purchase of the land; that no agreement of any kind or nature was ever talked of whereby he should purchase the land (Evidence of Kester, pg. 3447-8). Mr. Little made his final proof, purchased the land, mortgaged the same for the purchase price, and

after holding it for some time he sold it to William F. Kettenbach; and on pages 1619 and 1620 the witness testifies in response to a question from Mr. Gordon:

> "Q. And did you have a talk with him (Kester) before you turned the property over to him and told him about your conversation with Robnett?
>
> A. Yes, sir; he told me he had nothing to do with what Robnett may have had to say in regard to that, because Robnett was in with some other interest on a deal of some kind to sell the timber, and that he had been unsuccessful. The timber market was dead, and he couldn't wait any longer, he said that he had to have his money."

On page 1623 the witness testified as follows:

> "Q. Mr. Little, how long did you keep your land after you made final proof before you negotiated a sale of it—before you talked of selling it?
>
> A. Well, a short time afterwards I had a talk with Mr. Robnett in regard to it, and reminded him of his promise to dispose of it."

Here the witness tells about Robnett stating that he was forming a pool in which he had included many claims, and on the same page he testifies:

> "Q. Now, did he say who was in that pool?
>
> A. No, he didn't mention any names.
>
> Q. He never mentioned Kester's and Kettenbach's names?
>
> A. No, he never mentioned their names to me at any time.

Q. Now, how long before October 24th, 1904, was it before you talked to Mr. Kettenbach about buying?

A. Well, I talked to him up the street here, right about opposite this next corner, one night —stopped him in his rig, and I talked to him about it, and he said he didn't know anything about it, if I remember correctly; that he wasn't buying any timber; but to go ahead and see Clarence; he said, 'Clarence is looking after that thing the best he can.' He said he knew he was in some kind of a deal to dispose of some of the claims for the boys.

Q. Well, what boys?

A. Well the boys around town here that were in that country up there where I was—Storer and myself and Mr. Benton and some others.

Q. Kettenbach told you to try to sell to someone else, didn't he?

A. Yes; he told me to try to sell to someone else. Well, I told him that Robnett claimed that according to our agreement he was to sell my claim for me, it was in the pool, and I couldn't see how I could sell to anyone else as long as it was in that pool. They explained to me that the land was more valuable—that they could get more out of it—if the land was all together.

Q. Then your arrangement with Robnett was not carried out?

A. No, it was not.

Q. And did you say that Kettenbach told you that he had nothing to do with Robnett's deal, or the sale that Robnett was to make of the land, or something of that sort?

A. Well yes, if I remember correctly. It is all so long ago that the deal nearly all has gone from my mind, except just the main points of the case.

Q. You had no contract or understanding or agreement, either express or implied, with Mr. Kettenbach or Mr. Kester or Mr. Dwyer, to sell them this land, before you filed your sworn statement?

A. No, sir.

Q. Or before you made your final proof

A. No, sir.

Q. And nothing until mare than a year after you made your final proof—October 24th, 1904—some time about that time?

A. I don't remember the dates at all.

Q. About the time you executed the deed?

A. Yes, sir."

In this particular case it seems that the entryman tried to sell his land to various parties and finally persuaded W. F. Kettenbach to purchase the land at the price for which it was sold. Kettenbach was not anxious to acquire the land; he was not purchasing land at that time, and it seems that the price he paid was more than the entryman could obtain from anyone else. It seems very strange that such evidence as this would support a charge of fraud and especially the charge of a prior agreement to purchase the land prior to the filing of the sworn statement.

ELLSWORTH M. HARRINGTON.

Ellsworth M. Harrington's direct examination begins on page 1347. On page 1350 the witness testifies that he asked Mr. Robnett something about tak-

ing up a timber claim. On page 1355 the witness testifies in response to a leading question that Robnett first broached this subject to the witness and suggested that he (Robnett) advance the money for the purpose of taking up a claim, and that Robnett was to get a commission out of it for selling the claim.

> "Q. Then he was to sell the claim?
>
> A. No, he wasn't to sell it—if he did sell it he was to get a commission for selling it. There wasn't no agreement that he was to sell it.
>
> Q. You mean you didn't have any written agreement?
>
> A. No, nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it, he had my permission to sell it.
>
> Q. That was the original understanding, was it not?
>
> A. I don't think there ever was any exact understanding made about it. It was a kind of a—I don't know whether you would call it a mutual agreement or not; we were brother in laws, and naturally, as he was in the timber business he would handle my claim for me."

The witness further testifies on page 1356 as to Robnett trying to sell the claim after final proof was made. On page 1360 the witness testifies that he sold the land to W. F. Kettenbach; that he signed a deed bearing date May 8, 1906; the patent was issued August 3, 1904; the sworn statement was filed

March 20; Receiver's receipt and Register's certificate issued June 15, 1903. It will thus be seen that the entryman held his land from the time he made his proof on June 15, 1903, until May 8, 1906, before he made the sale.

On page 1366 the witness testifies that he held the land three years after making final proof, that he never talked with Mr. Kettenbach regarding a sale of the land at all; that he had some conversation with Robnett regarding the sale of the land, but never talked with Robnett concerning a sale of it to Kettenbach. The evidence of the witness is corroborated by the evidence of William F. Kettenbach and the other witnesses in relation to the acquiring of title to this land.

WREN PIERCE.

We do not consider it necessary to enter into a lengthy discussion concerning the entry of Wren Pierce, for the reason that Wren Pierce did not appear and testify. The only evidence in relation to this being a fraudulent entry is an unsupported statement of Robnett which is inconsistent with belief, and in conflict with the evidence of Kester and Kettenbach. It is sufficient to say that the evidence

conclusively shows that there was no fraud in the acquisition of title to this particular tract of land.

BENJAMIN F. BASHOR,

The evidence of Benjamin F. Bashor appears at pages 2090 to 2101 of the record. Mr. Bashor testified that Mr. Robnett first spoke to him concerning the location of a timber claim; that there was but little said about it; it was in the early part of the year 1903, either January or February. He simply told the witness it was a chance to make some money; that there were timber claims being taken up. On page 2093 the witness testifies that he gave his note for the location fee; that he gave his note for the entire fee for location, of $100 or $125, and $400 for the purchase of the land. The witness gave Robnett a mortgage for the amount. This was on the same day he made his final proof; that he had no conversation with Mr. Kettenbach. On page 2099 the witness testifies on cross-examination as follows:

> "Q. You had no arrangement or understanding with Mr. Robnett to sell this land before you made your proof?
>
> A. No.
>
> Q. And no such arrangements with Kettenbach and Kester?

A. No sir; never a word said among any of us or either of us before final proof was made.

Q. How long was it after you made your final proof before you sold your land?

A. As near as I remember, it was about—it must have been in the neighborhood of three years, before the conveyance was made."

The witness also testified he got $1100 for the claim. The evidence of this witness is corroborated by the evidence of William F. Kettenbach and is certainly sufficient to show that this entry is valid and should be sustained.

JOSEPH B. CLUTE,

The next entry is that of Joseph B. Clute, which is included in the amended bill by mistake as the same was intended to be and was included in Bill No. 406. We will refer more particularly to this entry in our reference to Bill No. 406.

FRANCIS M. LONG, JOHN H. LONG, BENJAMIN F. LONG.

These three entries may properly be considered together and a reference to the evidence of John H. Long will be sufficient as it appears that he was acting in the interests of the three. We will call attention, however, to a repetition of the entry of Ben-

jamin F. Long, the first description wherein the land is described as Section 18 being an error. The only land entered upon by Benjamin F. Long was in Section 13.

We call attention to the evidence of John H. Long and the statements therein made, appearing on page 1254 of the record, wherein the witness testifies:

> "A. No; I had spoken to him (Robnett) some time prior to that about taking up a claim, and at that time he didn't have no claim. I guess he hadn't entered into the timber business, or something, and then afterwards he thought he had a good proposition and called me in .
>
> * * * *
>
> "A. The proposition he made, as near as I can remember, was that he would locate me on a timber claim, and he would loan me the money with which to prove up with, and he would charge me $125 for location fee, I believe, something like that, and I was to pay $200, I believe, for the use of this money, and the risk as he explained it, in making this loan. I think he said he had no interest in it except that he must have a little bonus, as he called it, or something like that, to insure him a little something for his trouble, and for the man that furnished the money—that loaned this money, that had money to loan for that purpose; he wanted a little something out of it.
>
> * * * *
>
> "A. And I think that this was to be incorporated into a mortgage after the final receipt was received.
>
> * * * *

"A. My father, brother and I went to the bank and gave a note one day after date.

* * * *

"Q. What were you to do with your land after you had made your final proof?

A. Well, there was nothing said as to what we were to do with it any more than he might be able to sell it, and realize a profit of about $800 on it.

Q. Didn't he guarantee you so much?

A. No, he said, I may sell it for $800.00.

A. Was he to have the right to sell it for you?

A. No, not particularly; anybody had the right to sell it.

Q. I am speaking now about what your conversation was.

A. I asked him if I had the privilege of selling this to anybody I wanted to, and he said I had."

On pages 1270 and 1272 appears an escrow agreement for the sale of this land to one J. M. Hayden. This agreement was executed by Mr. Long and Mr. Hayden long prior to the time the land was purchased by Mr. Kettenbach.

On pages 1272 and 1274 the witness relates certain conversations with Mr. Kettenbach relative to the sale of the land to him, and the purchase of a note by Mr. Kettenbach from Robnett.

On page 1277 the witness testifies that the affidavit he made at the time of making final proof is true. In this affidavit he states that he has no con-

tract or agreement either directly or indirectly with anyone for the purchase of the land.

On pages 1278 to 1297 appears the evidence of Francis M. Long, and on page 1280 the witness testifies:

> "Q. And was there any understanding as to how much you were to get out of this claim?
> A. No, sir.
> Q. Wasn't anything said about that?
> A. No sir.
> Q. What were you to do with the claim after you got it?
> A. We intended for to pay this claim out—get money and pay this claim out. I had no money of my own that I couldn't get a hold of at that time, is the reason I borrowed this money. We aimed to pay it out and keep the claim.
> Q. What were you going to keep it for?
> A. Well, for the value of the timber."

On pages 1296 and 1297 the witness testifies that he had no contract or agreement for the sale of the land prior to his final proof, and on page 1296 he states that his affidavit that he made at the time of filing his sworn statement was true.

The evidence of Benjamin F. Long, appearing at pages 1297 to 1317 of the record, is in substance the same. On page 1314 and 1315 the witness testifies that he had no agreement for the sale of the land prior to the time of filing his sworn statement, and making his final proof, and that the affidavit he

signed to that effect was true. It appears that the defendants did not desire to purchase the land; that after several efforts and negotiations Mr. Kettenbach was finally induced to purchase the same. We can hardly understand under what theory the Government could consistently contend that these entries were fraudulent and should be cancelled.

BERTSAL H. FERRIS.

The evidence of Bertsal H. Ferris appears at pages 873 to 898 of Record. On pages 873 and 874 the witness tells of meeting Robnett and engaging in conversation with him concerning filing upon a timber claim. It appears conclusively from the evidence that the witness had no agreement with Robnett for the purchase of the land prior to the time he made his final proof.

On page 896 the witness testifies that the affidavit he made when he signed his sworn statement that he had made no contract either directly or indirectly for the sale of the land was true. On page 897 the witness testifies:

> "Q. Then, that affidavit that you made at that time was true? A. Yes sir.
>
> Q. Now, you had had no talk with Mr. Kester or Mr. Kettenbach or Mr. Dwyer about it up to the time you made your final proof, had you?

A. No sir.

Q. The first talk you had with either of them about it was after Mr. Kettenbach notified you that your note was due?

A. No, I had no talk with him then; he simply wrote me those notes .

* * * *

Q. And you had kept your land about—how long did you say you kept it before you sold it?

A. Well, it was two or three years; I think it was two years anyway.

Q. And that is your first agreement or contract that you had made for the sale of your land?

A. Sir?

Q. That was the first contract or agreement you had made for the sale of your land up to that time?

A. Which?

Q. The one you made two or three years afterwards, when you sold to Kettenbach?

A. When he took it on the mortgage.

Q. Had you tried to sell it to anyone else?

A. I gave an option to sell it.

Q. Who did you give an option to?

A. Fred Emory.

Q. Did you give an option to anyone else?

A. I think I gave two; I don't remember who the other one was to."

The evidence of the witness is not in conflict with the evidence of Mr. Kettenbach in relation to the circumstances surrounding the purchase of land, and certainly if the entryman is to be believed, and if Mr. Kettenbach is to be believed, this entry should remain intact. Mr. Kettenbach did not even desire

to purchase this tract of land, and finally did purchase it with a great deal of reluctance.

GEORGE RAY ROBINSON.

The evidence of George Ray Robinson is to the same effect as that of Bertsell H. Ferris. In fact, they visited Mr. Robnett together and had the same arrangements for the sale of the land. Mr. Robinson's evidence is found at pages 1317 to 1346 of the record. On pages 1319 to 1321 the witness testifies to his conversations with Robnett relative to these particular tracts of land, and his arrangement for the taking up of a claim, the procuring of the money for the payment of the purchase price, the payment of the location fee, and the giving of a mortgage upon the land for the purpose of securing the same. On page 1322 the witness testifies:

> "Q. When you filed on this land, and prior to the time you filed on this land, after your first talk with Mr. Robnett, what was your understanding you were to do wtih this land?
>
> A. Well, the understanding was that he had a buyer in view, and he was to sell the land for us.
>
> Q. Now, what was your understanding? Was it your understanding that you were to sell it to whom Mr. Robnett told you?
>
> A. Well, not exactly that; he was to sell the land in case he could, but in case he couldn't

or didn't sell it, we had the privilege of selling it to someone else.

Q. I understand that, but until you found out that he couldn't sell it, your understanding was that you were to let him have the sale of it, is that correct?

A. Well, I don't think that; I don't know exactly how that could be, but I know I didn't try nor didn't have any intention of trying to sell it, but I depended on him to make the change for me.

Q. That is what I am trying to get at, Mr. Robinson, if your understanding with Mr. Robnett before you took up this claim was that he was to control the sale of it.

A. Yes, he was to sell it, but I believe that in case I found a buyer that would give more I would have sold it.

Q. When did you get that notion into your head?

A. Well, I don't know; I don't believe there was anything in the contract that would have kept me from that, but at the same time I didn't have any intention of doing it.

Q. When did he tell you that he would sell that land?

A. About the first of September, I believe."

On page 1340 the witness testifies on cross-examination that he made his final proof about June 21st, 1903, and deeded the land October 16, 1905, showing that he held the land for more than two years after making final proof before the sale was made; that his first conversation with Mr. Kettenbach regarding the sale of the land was a short time prior to his

making the same. On pages 1341 and 1342 the witness testifies:

"Q. Do you remember overtaking Mr. Kettenbach on the street one time and talking to him about this claim and about your note and mortgage?

A. I believe I did.

* * * *

Q. Now, don't you remember that Mr. Kettenbach told you to keep your claim and to pay the interest or the principal in $5.00 payments?

A. Yes sir.

Q. You remember that, do you?

A. Yes, it was some time—I don't remember whether it was this particular time you think of or not.

Q. Well, at some time during these negotiations with Mr. Kettenbach he told you to keep your claim and pay him in $5.00 payments, or any payments you could make?

A. Yes.

Q. To pay him $5.00 a month.

A. Yes, he wanted me to do that.

Q. Now, didn't you tell him that you couldn't sell your claim and you didn't want to keep it?

A. Yes.

Q. Didn't he also tell you that if you wasn't satisfied if you would come in he would look over the papers and see how much he could allow you for the claim?

A. Yes.

Q. And he had carried your note then something over a year; upwards of two years?

A. Yes.

Q. And then you went to the bank in a day or two for him to figure up what he could give you?

A. I did.

Q. And it was at that time that you reached the agreement to sell him the land?

A. Yes sir.

Q. And you had had no agreement with him before that time?

A. No, no agreement."

On page 1343 the witness testifies that he gave Robnett certain options upon the land, and thinks he gave him two options. And on pages 1344 and 1345 the witness testifies that the affidavit he made when he signed his sworn statement was true, and testifies further as follows:

"Q. And the only undertanding you had was that you would give a mortgage on it to secure the money you borrowed?

A. Yes.

Q. That is the only contract you had, and you never had any contract with either Mr. Kester, Mr. Kettenbach or Mr. Dwyer until your agreement some two years after you made your final proof to sell it to them? A. No sir."

It appears that the defendant Kettenbach purchased this claim with a great deal of reluctance and endeavored to persuade the entryman to retain his claim and pay him in small payments, and after the entryman was unable to sell the claim to anyone else for more money he finally sold the same to the defendant Kettenbach.

CHARLES W. TAYLOR

The evidence of Charles W. Taylor in relation to his entry is found at pages 1058 to 1110 of the record. The witness testifies on page 1060:

> "Q. What did he (meaning Jackson O'Keefe) say about taking up a timber claim?
>
> A. He just simply asked me if I didn't want to take up a timber claim. He said he was going to take up one, and wanted me to go with him, something to that effect. * * *

The witness also testifies that Jackson O'Keefe wanted him to see his brother Edgar J. Taylor, Joseph H. Prentice and Edward Dammarel.

On page 1062 the witness testifies:

> "A. At the time he spoke to me about that, the first conversation he had with me about he would furnish me the money, he told me that he would buy the claim of me."

The witness also testifies that he was to give him $150; also that he was to tell Mr. Dammarell and Mr. Prentice the same thing. On page 1063 the witness testifies that O'Keefe told him that George Kester was going into the same neighborhood with a crowd to take up claims. The witness did not remember whether he said Kester was taking up for himself or just how he did say it. The witness also testifies to going to the timber, filing upon a claim, getting the money from Mr. O'Keefe to pay the purchase price, the publication of his notice, and

the various steps taken to purchase the land. On page 1069 the witness testifies:

"Q. Were you to sell it to him, or to someone else?

A. Well, he was the one I was dealing with; he never told me about selling to—never mentioned nobody else's name about me selling it to.

Q. Did he give you to understand that he was acting for someone else?

A. No sir, not then at all.

Q. Did he later?

A. Later on he told me he couldn't do what he had agreed to.

Q. Now, we will get to that after awhile. Did he tell you he was carrying on that transaction for Mr. Kester?

A. No sir, he didn't say it in that way; that him and Mr. Kester was taking up this land.

Q. Was that the way he said it?

A. Something like that.

Q. And that you were to convey it to him to get the $150?

A. Somethnig like that."

On page 1070 the witness testifies that he borrower the money and gave a note for it; that he was to sell the land to Mr. O'Keefe after he got a patent for it, and testified further as follows:

"Q. But that arrangement was made before you ever went to see the land is that correct?

A. Yes sir, but he changed that though, contradicted himself, and said he couldn't do that.

Q. When did he make that statement?

A. When we was on the road to the timber.

Q. Did he tell you who had advised him that it couldn't be done that way?

A. Yes, sir.

Q. Who A. George Kester."

On pages 1071-1072 the witness further testifies that George Kester told him that he could not make an arrangement to purchase the land prior to the time final proof was made. On page 1086 the witness identifies an affidavit which he made in relation to his entry and testifies that the statements contained in that affidavit are true. We call the Court's attention to this affidavit for the reason it is in substance the same as the affidavit made by Edgar J. Taylor, Joseph H. Prentice and Edgar H. Dammarel.

On page 1088 the witness refers to an affidavit which he was compelled to execute for Special Agent O'Fallon. A desperate effort has been made to compel the witness to re-affirm the statements contained in the affidavit he made for these special agents. This affidavit was made at a time when the witness appeared before the grand jury at the request and dictation of special agents Goodwin and O'Fallon and did not state the truth. The witness testifies on page 1088 that these special agents told the witness that if he did not make the affidavit they would send him to the penitentiary. The witness testified that

he made a statement to them and that they told him they knew he was lying about it, was not telling the truth, and that they knew the arrangements he had with O'Keefe; and the witness further testifies as follows:

"Q. Yes, when you made your first statement to them down there at Boise before you made this affidavit, you was not lying to them, was you?

A. No sir, I was aiming to tell the truth.

Q. Did they ask you questions, and was this affidavit made up from questions and answers they asked you, this affidavit you made for Mr. O'Fallon down there at Boise?

A. Yes sir.

Q. And did they tell you that they knew that Kester and O'Keefe were in together?

A. Yes sir.

Q. And it was after that that this affidavit was made up, this affidavit that you made down there for Mr. O'Fallon and Mr. Goodwin?

A. After that that affidavit was made up?

Q. Yes, after they told you they knew Mr. Kester and O'Keefe was in together?

A. Yes sir, that was the last thing they done, was to make that affidavit, before I left Boise.

Q. Wasn't it a matter of fact that Mr. O'Keefe told you that Kester and some other parties were going up into the timber to take up claims?

A. Yes sir.

Q. Mr. O'Keefe never told you that he and Kester were in together and that they were going to have people locate on timber claims, did he?

A. I didn't understand it that way. He told me the second time I talked to him about it—that was the time we went up there to take up timber claims,—that was the time he told me he couldn't make no agreement with me.

Q. Didn't he tell you that Kester told him that that kind of an agreement was against the law?

A. Yes sir.

Q. And it was the first arrangement that you was talking to Mr. O'Fallon and Mr. Goodwin about that was embodied in this affidavit, was it not?

A. Yes sir.

Q. Did you tell Mr. Goodwin and Mr. O'Fallon and Mr. Ruick about the second arrangement you and Mr. O'Keefe had, that he couldn't make that kind of an agreement?

A. Yes sir, I told him that in the grand jury room.

Q. They didn't include that in your affidavit, did they?

A. I think I told him in the grand jury room; I know I told him that some time.

* * * *

A. There was some things asked me I think in the grand jury room that wasn't asked me there.

Q. Then this affidavit was made up from your talk with Mr. Goodwin and Mr. O'Fallon regarding your first arrangement with Mr. O'Keefe?

A. Yes sir.

Q. And it does not refer to your second arrangement with Mr. O'Keefe, where he told you that he couldn't make that kind of an agreement, that Kester told him it was against the law?

This affidvit don't refer to that, you remember that, don't you?

A. No sir, I don't think it does.

Q. After Mr. O'Keefe told you that he couldn't make an agreement with you, you considered that that arrangement you had made with Mr. O'Keefe was all off, didn't you?

A. Well, that was the way it looked.

Q. Well, wasn't that the way you understood it?

A. That was the way I understood it, that I had no agreement then.

Q. And you made no agreement from that time on until after you made your final proof?

A. No sir, there was nothing said about it then until I got my receiver's receipt."

The witness also testifies that he and his brother borrowed eleven hundred dollars from Mr. O'Keefe, which was used in paying for the land; that after making their final proof he and his brother talked over the advisability of selling the land. (Page 1092 of Record). That this conversation took place on their way home; that they went to talk to Mr. O'Keefe about it after they arrived home the next day or a day or two after; that they told O'Keefe that if they could get $150 for the claim over and above that note they would sell it. Witness does not remember just what O'Keefe did say. He did not say much about it at that time. He was talking to the witness's brother regarding it. On page 1093 the witness testifies that after he returned home he

and his brother had made arrangements to sell to O'Keefe, which was the first time anything was said about it, and that he felt under no obligations to sell his land; that if he could have obtained more for it from someone else, he would have felt free to sell it.

On page 1095 the witness testifies that the affidavit he made when he filed his sworn statement, in substance: that he had made no other application under said act, and that he was taking the same in good faith and had made no agreement to sell the same, was true. It affirmatively appears from the evidence of Charles W. Taylor that the original understanding was that O'Keefe would buy the land after title was acquired; that he subsequently learned that such an arrangement as that was in violation of law; that he spoke to the witness, telling him he could not do that, but as the witness had started to the timber he would loan him the money to make his final proof, and pay the purchase price, taking his note for the same. This arrangement was agreed to by O'Keefe and the witness and they acted upon this understanding. After final proof was made the witness and his brother were returning home together; they talked about the advisability of selling their land, and concluded if they could get their notes back and $150 over and above their expenses

they would sell their claims. They went to Jackson O'Keefe asking him to purchase the land. Jackson O'Keefe did not approach the witness. It is also clear, taking into consideration the evidence of the other witnesses, that O'Keefe told him he would purchase the land, but would give him a year to either redeem it or sell it to someone else; that the deeds were not recorded at that time; that this was the first arrangement that was made for the sale of the land subsequent to the time O'Keefe told the witness he could not carry out that arrangement. It is very clear that the affidavit made by the witness at the time of filing his sworn statement was true, and that the affidavit made by the witness subsequent thereto and identified by the witness was true. This affidavit identified by the witness is shown at page 4125 of the record, and is Defendant's Exhibit "E."

EDGAR J. TAYLOR.

The evidence of Edgar J. Taylor in relation to his entry appears at pages 1110 to 1139 of the record. On page 1111 the witness testified as follows:

> "A. He (Charles Taylor) said he could take up a timber claim at the same time and get the

money to pay for it, and sell it for $150.00 above cost, and sell it as soon as we got title.

* * * *

Q. Now, did you go to see Mr. O'Keefe about this claim?

A. Well, I never seen Mr. O'Keefe about it at all. I met him down here at the depot when we started to go to Pierce City, that was the first time we met him after that.

* * * *

Q. What did Mr. O'Keefe say to you?

A. He simply said he would furnish us the money to get the claim on and take our notes, and if we wanted to sell after we got title he would give us $150."

The witness also testifies to the circumstances of his going to the land, his making final proof, the payment of location fee, and to giving his note for the money he borrowed from Mr. O'Keefe. And on page 1121 the witness testifies:

"MR. GORDON: Q. Well, state what the understanding was that you had with Mr. O'Keefe with reference to taking up this claim.

A. Well, the understanding I had was with my brother, that we could sell it for $150 over and above costs after we had title. * * We could sell it to O'Keefe.

Q. Didn't you feel under any obligation to sell it to Mr. O'Keefe.

A. I did not.

Q. You assumed, then, that he was just going to furnish all the money to take this up, and you were under no obligation?

A. I considered that I was under obligation for the note I gave for the money.

Q. But you didn't give the note until after you got the money and you had been over the land?

A. Yes sir."

On page 1123 the witness testifies that Mr. O'Keefe wanted him to give a bond for a deed to secure the note, and the witness turned the Receiver's receipt over to him and gave a bond for a deed at the time. On page 1125 and 1126 the witness testifies that he did not know that he had parted with all interest in the land when he received the $150; that he supposed he was giving a bond for a deed; and on page 1127 the witness testifies that he understood from Mr. O'Keefe that he could redeem the land at any time he could pay the note; that he did not receive the note back until after he returned from Boise where he had testified before the grand jury, and at that time all possibility of redeeming the land had passed. On cross-examination at page 1134 the witness testifies concerning his former testimony which is set out in full, showing that the witness' evidence now, taking the same as a whole, is not materially different from that given at the former trial. The witness testified at the former trial, at p. 535, Case No. 1605, as follows:

"Q. Your understanding with Mr. O'Keefe was that if you could sell that claim for more than $600 before the maturity of that note, you

would be entitled to the excess, did you not? The amount you could get over the $600?

A. If I could get more for it?

Q. Yes.

A. Well, when I gave a bond for a deed, I thought I would have a right to redeem it and get more for it, if I could, at the time I gave the bond for the deed.

Q. Now, you say Mr. O'Keefe told you that he would not buy any land until after you got the title to it?

A. Yes.

Q. Mr. Taylor, you understood that you had no arrangement, contract or agreement with anyone to sell this land at the time you filed on it, or the time you made final proof, did you?

A. Yes sir, that was my understanding.

Q. And if you had an opportunity to sell it to someone else for a thousand dollars more, you would have felt at liberty to sell it to them, would you not?

A. I would; yes, I would."

The witness also testifies on page 1135 that the affidavit he made at the time of filing his sworn statement was true. And he testifies that the affidavit he made before C. L. Thompson on the 30th day of November, 1906, was true. This affidavit appears at page 3134 of the Record, and is Defendant's Exhibit "G."

On page 1137 the witness testifies:

"Q. Mr. Taylor, regardless of what you may have said in any of these statements or affidavits or any of your evidence that you might have given heretofore, I will ask you to state whether

or not you understood that you had any understanding or agreement with anyone that you was to sell your land at the time you filed on it?

A. I did not; my understanding was that I was simply borrowing the money to file on it and had a right to hold it.

Q. And you supposed you had a right to redeem this land within a year?

A. Yes sir."

Taking the evidence of the witness as a whole, measured by the affidavit just referred to, the evidence of the witness is not in conflict with this affidavit, and the only logical conclusion to be reached is that the witness had no understanding or agreement for the sale of this land. Mr. Kester testified that no such agreement existed. We are at a disadvantage by reason of the fact that Jackson O'Keefe is dead and he is not here to explain the circumstances surrounding the purchase of this land, but a court of justice could not refrain from commending O'Keefe for abandoning an unlawful proposition, if it was ever undertaken, and certainly if any understanding ever did exist between O'Keefe and any of the Taylors for the purchase of this land, it was abandoned prior to the filing of any of the sworn statements.

JACKSON O'KEEFE.

Jackson O'Keefe's is the next entry, and there is no evidence in the record tending to show that this entry is fraudulent, except possibly the evidence of Clarence W. Robnett, which is denied by Mr. Kester and by other witnesses, and his evidence is impeached in so many particulars and is in direct conflict with so many credible witnesses that we do not consider it necessary to enlarge upon the same.

Defendant's Exhibit "F," the affidavit of Jackson O'Keefe, appears at page 3142 of the record, and we believe it worthy of consideration in view of the fact that Jackson O'Keefe is now deceased and could not be present to testify in person.

JOSEPH H. PRENTICE.

The evidence of Joseph H. Prentice is found at pages 1225 to 1252 of the record. A careful reading of Mr. Prentice's evidence will convince the court that there was no fraud in relation to this entry. On page 1226 of the record, the witness testifies: That Mr. Charles W. Taylor came to the witness, asked the witness if he wanted to make some money the witness told him he did if it could be done honestly, and then he spoke about taking up a timber claim.

"A. I told him I had no money to make an entry or prove up, and he says: 'Uncle Jack will loan you the money'; (speaking of O'Keefe); and I says, 'Are you sure?' and he says, 'Yes, I am getting money from him. and Ed is getting money from him, and he told me he would loan it to you.'

* * * *

A. Oh, some few days when he came up from Asotin, I went around to see him.

Q. What was your conversation wtih O'Keefe?

A. I told O'Keefe what Charley had said, and he says, 'Yes, that is right; I will loan you the money, and take your note for everything,' he says, 'your straight note for a year for the filing money, and the proving-up money, and the current expenses going up to see the timber, and also to pay my locator.' And I says, 'Do you think I can ever sell it?' and he says, 'Yes, you can sell it;' he says, 'in case you get tired of the deal I will give you $150 over and above all expenses."

The witness also testifies to his going to see the land, his filing his application and sworn statement, his being offered $500 for his place in the line by a man by the name of Fitzgerald, a man whose name has been prominently connected with the prosecution in this case, as well as in other cases; and on page 1233 the wtiness testifies:

"Q. Why didn't you take this man's $500, Mr. Prentice?

A. Well, I thought I could make more out of that.

Q. Wasn't it your understanding that you were to get $150?

A. I knew I could get that, but I never promised that I would sell it for that.

Q. Didn't you feel under any obligation to Mr. O'Keefe?

A. No sir, I did not, because I had given my note.

Q. But you hadn't given any note then.

A. No, but I knew I had to. I was negotiating money from my brother in law in the East. My intention was to keep that claim for awhile at least."

On page 1239 the witness testifies to how he came to sell:

"A. I will tell you how that come along. I owed some money on my house, and the lumber company was crowding me for it, and they wanted me to go up there into the mountains, the Blue Mountains, and file on a homestead and stay there until I had lived there long enough to commute, and then sell the land to the Blue Mountain Company, you see, and they had offered me work there in the mill, and I didn't want to take my wife and children up there, and I thought possibly I could get the money from the East, and possibly hold this claim down for a while and sell it; and my brother was thinking of investing some money in the East and I wrote him and asked him if he could help me out, and I asked Jack, and I said, "Jack, now you told me I could get $150 any time I wanted it, and I would like to get that much money, but I don't want to sell it.' And Jack says, 'All right, I think we can fix it up.' And he told me I could sign a bond for a deed, and that is what

I thought I did sign until Mr. O'Fallon and Mr. Goodwin convinced me I had signed a warranty deed."

On page 1248 the witness testifies on cross-examintion that Mr. O'Keefe told him he would have a year, or until the maturity of the note in which to redeem the land, that the note ran out, and witness found he did not want to redeem it; that O'Keefe told the witness he would not record the deed until the witness found out whether or not he wanted to take up the claim.

"Q. What was your conversation with Jack regarding your sale of the land. That is, after you proved up and when you decided to sell it?

A. Well, George, I never decided to sell it.

* * * *

"A. I told O'Keefe he had told me I could get $150, and I said I would like to get it to pay off the lumber company for the lumber in my house, and I says, 'Is there any way I can get it from you without selling the place?' And he said, 'Yes, by giving me a bond for a deed,' and that is what I supposed I had signed.

Q. And you had no contract or agreement to sell it to him?

A. No sir, I did not; I knew I could get so much, but I never had told Jack I would sell it for that."

On page 1249 the witness identifies the affidavit he made and executed before George H. Rummens, a notary public. He states that the statements therein are true. This affidavit is marked "Defendant's

Exhibit J" and appears at page 4147 of the Record.

On page 1249 the witness states that the affidavit he made when he filed his sworn statement that he was taking the land for his own use and benefit, that he had no contract or agreement to sell the same was true.

FRED E. JUSTICE.

The next entry appearing in complainant's amended bill No. 388 is that of Fred E. Justice. There is no evidence to contradict the evidence of the witnesses in regard to this claim, nothing whatever to show that the entry was not made in good faith. Fred E. Justice is deceased and could not appear and testify, and we submit that an examination of the evidence will show that this entry should remain intact.

EDGAR H. DAMMARELL.

The next entry is that of Edgar H. Dammarell whose evidence appears at pages 1171 to 1201 of the record. On page 1171 the witness tetsifies as to the particulars of his taking up a timber claim, and who first spoke to him in regard to it:

"WITNESS: He said he was going to take up a timber claim and asked us (Mr. Prentice and I) if we thought that we would care to go up with them. I told him that in order to do so it would require some money, and that I didn't have it, and he said he didn't know but he thought perhaps his uncle would loan us the money." (The witness referring to a conversation with Charles W. Taylor). "That was Jackson O'Keefe."

* * * *

"Q. Well, at any other conversation with Mr. Taylor before you entered on the land, do you remember whether anything was said as to whether you would get a certain amount for your right or for your claim?

A. I am not sure about that conversation. Mr. Prentice and I have talked it over since, and Mr. Prentice and I don't agree as to what was said at that time. Now, whether his memory is right or mine is I don't know. I wouldn't like to make a positive assertion as to that.

* * * *

Q. Now, what arrangements were made after the first talk with Mr. Taylor?

A. Well, we made a loan—we made a loan from Mr. O'Keefe on my note.

* * * *

Q. No, but there was some arrangement made before you went in. State what transpired after you first talk with Mr. Taylor—Mr. Charles W. Taylor.

A. Well, I don't just remember how it lined up at that time, as to the date, but he made arrangements with Mr. O'Keefe to make the loan. in the event that he was satisfied with the timber, and we went in, and I think he made the loan after we came back, or just before we made

final proof; or rather not final proof—I guess you would call it final proof though.

* * * *

Q. Well, wasn't anything said at that time about the disposition of the land?

A. No, nothing said that I remember of. Of course, I knew that you couldn't dispose of the land until you had a receiver's receipt.

Q. There was nothing said whatever?

A. Nothing said whatever."

On page 1108 the witness testifies that after he returned from the timber, he learned that it was necessary for him to examine each and every legal subdivision, and he again made a trip to the timber for the purpose of more thoroughly examining the timber, and so that he could make a truthful statement that he had been upon each and every legal subdivision of the land.

The witness also testifies (p. 1182) relative to his getting money from O'Keefe for taking up an escrow agreement, and his dealings in regard to the land in question, also to the making out of his papers, his intention to apply to friends and relatives for the money with which to take up the note he had given O'Keefe and keep his land as a matter of investment, and on page 1193 the witness testifies:

"A. After thinking the matter over, and hearing so much about forest fires, I began to conclude—I came to the conclusion that if I didn't do so and if a forest fire ran through there it

would practically leave the claim valueless, and put me in a worse position than before; and I decided I would sell it.

Q. So you went to Mr. O'Keefe, or did he come to you?

A. I don't remember; I couldn't say for certain. We talked it over. We rode from Lewiston together in a buggy.

* * * *

Q. Now, what did he say about it? (meaning O'Keefe)?

A. Well(he said he believed it would be a good proposition to hold onto, and he said if I could make the raise it would be satisfactory to him.

Q. All that he wanted, you understood, was to get his money back?

A. Yes sir, I believe that was his idea."

On page 1119, the witness testifies on cross-examination:

"Q. As I understand, you had no contract or agreement to sell your land to Mr. O'Keefe or anyone else, at the time you filed your sworn statement, or at the time you made your final proof?

A. No sir."

The witness also testifies that the affidavit he made at the time he filed his sworn statement that he was taking the land for his own exclusive use and benefit and had no contract or agreement to sell it was true. The subsequent cross examination and redirect examination of the witness strengthens the witness's statement that he had no understanding or agreement to sell the land prior to the time he made his final proof. The affidavit of witness is marked "Defendants' Exhibit I" appears at page

4143 of Record, and is in substance the same as the affidavit of Joseph H. Prentice, and heretofore referred to; and we call the Court's attention to the same.

EDGAR H. DAMMARELL.

The next entry appears to be that of Edgar H. Dammarell, which was included in this bill by error, as Dammarell only made one entry and acquired but one tract of land, so this entry must be disregarded.

On page 3335 the defendant William Dwyer testifies to his knowledge of the entries of Charles W. Taylor, Edgar J. Taylor, Jackson O'Keefe, Joseph H. Prentice, and Edgar H. Dammarell, and at the bottom of page 3335 states that he located them. And at the top of page 3336 the witness testifies:

> "Q. And just state what connection you had with them.
>
> A. Why, they came up there when I was in the woods. They came in with Jackson O'Keefe and if I remember right Jackson O'Keefe had spoken to me once before, some time before, about getting some claims for some boys, and they came up there and we had a general talk. I was around there a couple of days, went through the timber and through the woods there; it was in the fall of the year, I think about this time of the year, possibly about the middle of Octo-

ber, nice weather; and I told them what conditions the land was in, and if they were opened why there would possibly be a chance to get some of them, if they were not all scripped or taken by the State, and I was cruising some of the lands at that time.

Q. And did you hear the evidence of some of the witnesses relative to them paying you a location fee with a hundred dollar bill?

A. Yes.

Q. What are the facts about that?

A. Some of them might have given me a hundred dollar bill, but I think most of them paid me in gold, if I remember right.

Q. Now, when you borrowed money for an entryman to make final proof, what would you do in relation to their paying the location fee?

A. I would borrow the full amount to cover the whole thing.

Q. And you frequently turned the whole thing over to them, and they would pay you back the location fee?

A. Yes, that is what they would give their note for. For instance, if they wanted to borrow $450.00, they would give their note for $550.00. They would want $450.00 to pay the land office and their expenses, and they would want $100.00 to pay their location fee. They would make the note for $550.00, and pay the land office, and pay me for my location fee, and still they would owe $550.00. And the same way, they would give a mortgage later on for the full amount."

On page 3337, the witness testifies to his transaction with Charles Carey, to which we will refer later on.

On page 3238 the witness J. W. Bradbury testifies:

"Q. Mr. Badbury, Mr. Robnett testified to there being a hundred dollar bill in the till or cash drawer ,or in with the cash at the teller's window, that was used by Mr. Dwyer, and for the payment of a location fee, and that it was kept in an envelope, and that it would be passed out to Mr. Dwyer and passed around to differentrymen and would be returned to the bank and placed in the envelope and kept there. Was there ever such a hudred dollar bill kept in the bank in that way?

A. Not while I was working there.

Mr. Tannahill: Not while you was there?

A. No, sir.

Q. Do you have any recollection of a bill of large denomination being kept there in an envelope for any purpose?

A. Yes, sir.

Q. What was that?

A. A thousand dollar bill.

Q. And for what purpose was that kept?

A. Well, for my own purposes—for my own protection.

Q. And what was that?

A. Simply to keep me from paying it out for small bills. They are very unusual—thousand dollar bills."

The witness Kester testifies on page 3157 as to what he knows concerning the entries under consideration here: The witness states that he knows something concerning these various entries. He is then asked to state his connection with them, to which he replied:

"A. We purchased the claims of Bingham, Prentice, and Dammarell, and Charles W. Taylor and Edgar J. Taylor through Mr. O'Keefe.

Q. What conversation did you have with O'Keefe about it?

A. Well, after these men had proved up, O'Keefe came to me and wanted to know if I would buy those claims if the boys should conclude to sell them, and I told him that we would. But I remember another conversation with Mr. O'Keefe; I think it was before he went up into the timber. And he said that he had been talking with his nephews, I think, about going with him up into the timber, and that he had told them that he would like to take them in there and buy their claims. I told him that he couldn't make any such agreement with them, that that would be contrary to the law, and that he couldn't have any such agreement of that kind."

On the same page the witness states that he had no agreement for the purchase of these claims prior to final proof, either with the entrymen herein named or with Jackson O'Keefe, and on page 3158 states that *the negotiations began after they made final proof.*

This brings us to a consideration of Bill No. 407 and we call the Court's attention to the specific entries and the evidence in support of the same.

CLINTON E. PERKINS.

On pages 816 to 844 the witness testifies concerning the taking up of the Timber & Stone claim, and on page 819 he identifies his sworn statement and preliminary papers. On page 820 the witness relates a conversation which he had with Harvey J. Steffey concerning his taking the timber and stone claim.

> "Q. What did he say to you about the claim when he told you that he had one that he could locate you on?
>
> A. Why, he told me he had found me a claim."

The witness had theretofore testified that he first went to Steffey and asked Steffey to locate him on a timber claim. The witness also testifies further:

> "A. I didn't have the money at the time he found the claim, and he told me that he would pay the expenses and I could pay him back.
>
> * * *
>
> Q. Did he tell you what you could get out of it?
>
> A. Why, he told me that he thought I could make a couple of hundred dollars over and above what it would cost.
>
> * * *
>
> A. Yes, he told me that it wasn't a good claim, but he was satisfied he could sell it for me and I could make that much."

The witness also testifies on page 822 that he was to pay Mr. Steffey $200 for locating him. On page 823 the witness testifies:

> "Q. Now, tell exactly what Mr. Steffey informed you you would have to do to make that $200.
>
> A. Well, he told me that he was satisfied he could sell the land and I could get $200 over and above my expenses. He said he positively could not make any bargain with me, but as far as he was concerned he was a friend of mine and he was satisfied he could get me that much money.
>
> * * *
>
> Q. Did he tell you just to rest easy in the matter and you would get rid of the land?
>
> A. He told me he was satisfied he could sell it.
>
> Q. And that was before you located?
>
> A. Yes, sir.
>
> Q. Did he bargain with you to give you that $200?
>
> A. No, sir."

On page 827 the witness testifies:

> "Q. Did you get the money from him (meaning Steffey) with which to make your proof?
>
> A. No sir.
>
> Q. Didn't you get any from him?
>
> A. Not to make proof with I didn't."

The witness further testifies that he borrowed $400 from Steffey, but that he used his own money with which to make his final proof. On page 828 the witness testifies:

"Q. Did you give him a note for it?

A. No, sir.

THE SPECIAL EXAMINER: If you had any money of your own, why did you take Mr. Steffey's money?

WITNESS: Because part of that money I owed and I couldn't afford to have it tied up.

MR. GORDON: You didn't intend to use that money of yours to make proof, did you?

A. My own money?

Q. Yes, sir,

A. I certainly did."

On page 834 the witness testifies on cross-examination as follows:

"Q. Mr. Perkins, as I understand you, your first conversation with Mr. Steffey was that you asked him if he could locate you on a timber claim.

A. Yes, sir.

Q. You told him you wanted to take up a timber claim?

A. Yes, sir.

Q. Then later he told you he could locate you on a timber claim?

A. Yes, sir.

* * *

Q. And he told you that he thought he could sell it for you so that it would bring you at least $200 over and above expenses?

A. Yes, sir.

Q. And did he tell you in that same conversation that he could make no contract with you to purchase it or to sell it?

A. Yes sir, he did.

Q. And it was your understanding that you was making no contract with him regarding the sale of your land?

A. That was what I understood.

Q. Before you made your final proof?

A. Yes, sir.

Q. And as a matter of fact you made no contract for the sale of your land——

A. None whatever.

Q. ——until after you made final proof?

A. No, sir.

On page 835 the witness testifies that the affidavit he made at the time he filed his sworn statement that he was taking the land for his own exclusive use and benefit and had no contract or agreement to sell the land to anyone else was true.

On page 837 the witness identifies his affidavit he made about the time he made the sale of the land (Defendants' Exhibit "D," page 4124). On page 837 the witness testifies that the affidavit is true. This affidavit was executed at the request of Harvey J. Steffey. The evidence of this witness is in conflict with the evidence of Harvey J. Steffey in some instances, but taking the cross-examination of Steffey together with his admissions on direct examination, the Court will arrive at the conclusion that the witness has testified truthfully, and that neither the witness nor Harvey J. Steffey understood that any agreement existed for the sale of the land prior to

the time final proof was made. Then, if any such agreement did exist, it in no way or manner affects Kester and Kettenbach, for the reason that they were not parties to it. The evidence of William Dwyer that no such agreement ever existed, which is supported by the evidence of both Kester and Kettenbach, that if any understanding or agreement of any kind or nature ever existed between the entrymen, it was unknown to either Dwyer, Kester or Kettenbach.

We respectfully submit that the entry of Clinton E. Perkins should remain intact.

MARY E. LONEY.

The evidence of Mary E. Loney is found at pages 2717-2745. On page 2717 the witness testifies to her residence and her acquaintance with William Dwyer; her relationship to Effie A. Jolly and to Clinton E. Perkins. On page 2718 she testifies to filing her application to purchase a timber claim; to her conversations with Mr. Meyers regarding arrangements had with Mr. Steffey, which was in substance:

> "Q. Yes, that Mr. Myers had with Mr. Steffey, relative to taking up his timber claim, with Mr. Mr. Myers?

A. Nothing particular, no. He just told me that he had taken a claim.

Q. And did he tell you that Mr. Steffey would furnish him the money with which to take a claim.

A. No, sir.

Q. Did you know that a few days before you had taken up a claim that Mr. Steffey had located Mrs. Jennie Myers on a claim, and she had filed?

A. I don't remember what time it was—how long it was before."

On page 2720 the witness testifies:

"Q. Now, how did you happen to go with him to look at the timber claim?

A. Why, I had sent him word that I wanted to take a claim.

Q. By whom did you send him word?

A. I sent him word by Mr. Myers."

On page 2721 the witness testifies:

"A. I don't know whether it was at that time or not; I think it was about that time, though, that he said he could get the money, but he didn't say where he could get it.

Q. And did he tell you what you would get out of your claim?

A. He told us about what we would get, yes.

Q. And that was while you were going to see the land?

A. I think it was; I am not sure. He said we would get between $200 and $250.

Q. And what were you to do with the claim to get that $250?

A. He never said anything to do with it.

Q. You were not to keep it to make the $250, were you?

A. No, sir, we didn't expect to.

Q. And what was your understanding as to whom you were to convey it to make that $250?

A. I didn't know who was to get it.

Q. I know you didn't know who was to get it, but who did you understand was to get it?

A. I didn't know. Nobody ever told me, and I didn't know who was to get it.

Q. Well, who was to sell it for you?

A. I supposed Mr. Steffey was.

* * *

Q. Now, do you remember the first talk, or the talk that you had with Mr. Steffey, either the first time you talked with him about the timber claim, or the time you went to view the timber claim, as to whether or not anything was said as to whether an agreement could be made to sell the land?

A. He said that he couldn't make any agreement; I remember that, but I don't just——

Q. He said he couldn't make a proper agreement with you to purchase the land?

A. He said he couldn't make any agreement."

On page 2740 the witness testifies on cross-examination as follows:

"Q. Now, you say that he told you that you ought to be able to get from $200 to $250 out of it ,over and above what it had cost you?

A. Yes, sir.

Q. And at one time you told him that you didn't have the money—money enough to pay your expenses of the taking up of the land, did you not?

A. Yes, sir.

Q. And it was your understanding that you were borrowing the money from him to pay these expenses, and to pay for the land, and that

you would pay him back as soon as the claim was sold?

A. Yes, sir.

Q. And he never asked you for a note, did he?

A. No, sir.

Q. If he had asked you to sign a note, you would have signed it, wouldn't you?

A. Yes, sir.

Q. Now, you also understand that Mr. Steffey was getting a location fee of $200, did you not?

A. Yes sir, I supposed he was.

Q. And you supposed that that was his interest in having you take up the claim.

A. Yes, sir.

Q. And his interest in furnishing you the money, so that he could make that $200?

A. Yes, sir.

The witness also testifies on page 2741 as follows:

"Q. Now, do you remember that after you had made your proof, that Mr. Steffey told you that your claim was a little better claim than the others; that it was quite a bit better claim, and that you would get a little more than the others did?

A. He told me that mine was a little better than Mrs. Jolly's.

Q. Better than Mrs. Jolly's?

A. Yes, sir.

Q. And you did get more for your claim than Mrs. Jolly got for hers

A. A little more, I think, if I remember right."

On page 2742 the witness testifies:

"Q. If you had had an opportunity to have sold it to someone else for $500 more than you received for it, or was to receive, you would have

felt at liberty to have sold it to someone else, and paid Mr. Steffey the location fee, and paid him back his money that you had received from him, would you not?

A. Yes, sir.

Q. And you would not have felt that Mr. Steffey was under any obligations to purchase the land if he didn't want to, would you?

A. No, sir.

The witness also testifies on page 2742 that the affidavit she made at the time she filed her sworn statement that she was taking the land for her own exclusive use and benefit, and that she had no contract or agreement to convey the land was true. The witness also identifies her affidavit marked Defendants' Exhibit "Y," appearing at p. 4158, signed Feb. 28, 1908, and states that the statements therein contained are true. This affidavit was signed at the request of Harvey J. Steffey. The evidence of the witness shows conclusively that there was no understanding or agreement for the sale of her land prior to the time final proof was made.

CHARLES E. LONEY

The witness Charles E. Loney testifies to the circumstances in relation to his entry, beginning at page 2745. The witness testifies that Steffey located him on the timber claim; that he was to get his expense money from Steffey; that Steffey said he

would furnish it; that the witness did not know at that time where he would get the money for his final proof. The witness also testifies on page 2747 that he had about $150 of his own money with which to purchase the land; he testifies how he came to get the money from Steffel to pay his filing expenses, and that he procured it from Steffey, because he did not have the money to spare at the time. On page 2748 the witness testifies:

"Q. Before you went to view the land and before you went to the land office to file any papers, the first time, was anything said as to what you were to get out of your claim?

A. We was under the impression that we was to get somewhere between $200 and $250.

Q. Where did you get that impression?

A. Through talk with Steffey.

Q. What were you to do with your claim to get that $200 or $250?

A. We was to sell it.

Q. To whom?

A. I didn't know who these claims was to be turned over to; I didn't know whether he was the man that was going to get them or not, at the time.

* * *

Q. What was your understanding?

A. What was my understanding as to what I was to do with this land after I made my final proof?

Q. Yes.

A. There wasn't no understanding as to what I was to do with the land. There was

no agreement or bargain of any kind made. Of course, there was just a little talk, as I said, that I understood it that way; but as far as there was any bargain or agreement, there wasn't."

CROSS-EXAMINATION.

On page 2762 the witness testifies on cross-examination that he first talked with Mr. Steffey, told him that he would like to take a claim; that Steffey afterwards told the witness that he had a timber claim for him; that he told Steffey that he didn't have the money himself to make final proof; that he made his final proof and used part of the money he received from Steffey and part of his own money, $150; and after the witness proved up he made a sale to Kester and Kettenbach; that he had no agreement with Mr. Steffey or anyone else for the sale of the land prior to the making of final proof; that the witness understood that Mr. Steffey would help him to find the buyer.

"Q. And if you had had an opportunity to sell that land for $500 or any sum more than Mr. Steffey or his buyer was willing to pay for it, you would have felt at liberty to sell it and pay Mr. Steffey back the money you had borrowed?

A. Yes, sir; I was under no obligation to him to let him have that land.

Q. And you didn't understand that you was entering into any agreement to sell the land before you made final proof?

A. No, there was no agreement whatever."

The witness also testifies on page 2764 that the affidavit he made at the time he filed his sworn statement was true. He also identifies the affidavit he made before William J. Todd, a notary public, on the 21st day of December, 1906, and testifies that his statements therein made are true. This affidavit was signed at the request of Harvey J. Steffey also. The evidence of the witness is very clear that he had no understanding or agreement with Mr. Steffey or any one else for the purchase of the land prior to his making final proof. The witness did understand that Steffey would find a buyer and assist him in making a sale after final proof was made. It is only natural that the entryman should be interested in knowing whether or not he would be able to sell his land after final proof, and with this end in view, made such inquiries.

We respectfully submit that the evidence of the entryman himself shows that he had no understanding or agreement for the sale of his land prior to the time final proof was made, and that there was no fraud in connection with his entry. Even if there was, it is not shown that Kester or Kettenbach, the

purchasers, had any knowledge of the fraud. The entry of this witness should remain intact.

FRANK J. BONNEY.

The witness Frank J. Bonney testifies at pages 795 to 816 of the record. On page 797 the witness testifies to his taking up a timber claim and what induced him to take up the claim. "I thought I could make a little money out of it—a profit." The witness also testifies that when he first talked with anyone about taking up a timber claim, he had a couple or three hundred dollars in the bank; that Harvey J. Steffey located him; that he talked with him regarding the taking up of a claim before he went to view, the land, and testified as follows:

> "A. I spoke to Mr. Steffey; I talked to him and asked him if he knew of any good claims, and I spoke to him a time or two.
>
> Q. And what did he say?
>
> A. I believe the first time I spoke to him he didn't know of any, and later he did and showed them to me."

At the bottom of page 800 the witness testifies:

> "Q. Now, what was it that Steffey said to you?
>
> A. Well, he told me that his claim wasn't very good, but he believed if I wanted to take it he could sell it for me for a couple of hundred

dollars, so that I could make that much profit on it.

Q. Did he tell you that he would guarantee you that you would make that much?

A. Well, sir, I couldn't say; I don't know as he did—I believe he did. I believe he told me that he was sure that he could get that much, and may be more.

Q. Were you to advance any of the money at all to take up that claim?

A. No sir, there wasn't nothing said about that, but I supposed that I was to put up the money."

The witness also testifies that he obtained a portion of the money from Steffey with which to make proof on his claim.

On page 805 the witness testifies:

"Q. Well, did you make your proof?

A. Yes, sir.

Q. And did you give them that money that Steffey gave you?

A. Well, sir, I had nearly enough money, and I used a little of that.

Q. You used a little of what?

A. Of the money that he handed me.

Q. How much of the money that he handed you?

A. I don't know how much—of—probably $50.

Q. And what did you do with the rest of it?

A. Why, I hung on to it."

On page 806 the witness testifies in response to cross-examination by Mr. Gordon, who after being unable to compel the witness to answer as he wanted

him to—in other words—after the witness refused to testify falsely, for Mr. Gordon, the following proceedings were had:

> "MR. GORDON: I will ask you the same question again: Didn't Steffey tell you that if you would take up a timber claim that Steffey would pay all the expenses, if you would convey it to him, or whoever he told you to, and he would give you $200 for it?
>
> MR. TANNAHILL: We repeat the objection.
>
> SPECIAL EXAMINER: Answer the question.
>
> WITNESS: Why, Mr. Steffey never told me that.
>
> MR. GORDON: Answer the question yes or no.
>
> A. No, sir.
>
> Q. What did Steffey tell you?
>
> A. He told me if I wanted to take a claim that he would guarantee me, or he was positive that he could sell it so I could make $200."

On page 813 the witness testifies on cross-examination as follows:

> "BY MR. TANNAHILL: Q. Mr. Bonney, did you ever have any conversation with George H. Kester or William Dwyer or Willliam F. Kettenbach regarding the sale of this land, before you made your final proof?
>
> A. No, sir, I don't believe I did."

The witness also testifies that he made no contract to convey it to anybody, and that the affidavit he made at the time he filed his sworn statement was true. The witness also testifies that he made a little

more than $200 out of his claim over and above expenses.

The witness identifies the affidavit which he signed about the time he transferred the land, and states that the same is true. The witness did not seem to understand the affidavit wherein it stated that he was not taking the same for the benefit of any other person. The witness understood that he was taking it for his own benefit and after the affidavit was understood by the witness he stated that it was true. The affidavit appears at page 4122, and is Defendants' Exhibit "C."

At the bottom of page 815 the witness testifies:

"Q. At whose request did you sign this affidavit?

A. At Mr. Steffey's."

We respectfully submit that there is no sufficient showing of fraud in connection with the entry of Frank J. Bonney that will justify the Court in setting it aside. William Dwyer and the defendants William F. Kettenbach and George H. Kester each testified that they knew nothing of any agreement between Stffey and the witnesses if any such agreement did exist, they were not a party to it.

JAMES T. JOLLY.

The witness James T. Jolly testifies on pages 2656 to 2689 of the record. On page 2656 the witness testifies to his residence, business, and occupation, his acquaintance with Harvey J. Steffey; his acquaintance with Charles Myers; his taking up a timber claim; that Harvey J. Steffey located him on a timber claim; that he was to get the money from Mr. Steffey with which to purchase the land; and on page 2661 the witness testifies that he was to pay Mr. Steffey a location fee of $200, and the witness also testifies:

"Q. What was your understanding as to what you were to get?
A. Well, there was no price understood.
Q. Well, about how much then?
A. Why, I expected to get in the neighborhood of $300 out of it.
Q. From whom did you expect to get that?
A. Through Mr. Steffey—from him.
Q. And was anything ever said as to paying any fee for Mr. Steffey locating you on this land?
A. Yes, sir; I was to pay him a fee.
Q. How much were you to pay him?
A. $200."

In the subsequent pages the witness testifies to going to view the land, his appearing at Lewiston for the purpose of filing his application, his making final proof, procuring the money therefor, and his

subsequent sale of the land and receiving between $200 and $250 over and above all his expenses.

On page 2674 the witness testifies on cross-examination that the witness first asked Mr. Steffey to locate him on a timber claim; that Mr. Steffey subsequently sent word to him that he had a timber claim upon which he could locate him. On page 2677 the witness testifies that Steffey never told him what he could get out of the land.

> "Q. Then there was no conversation between you as to what you could get out of it?
> A. Not any.
> Q. I see. And you had no understanding regarding that?
> A. No, sir."

On page 2678 the witness testifies that he arrived at the conclusion that he could get from $200 to $250 out of the land over and above expenses from the witness knowledge of timber after having examined the same; that he did not arrive at that conclusion from any statement made to him by Mr. Steffey; that Mr. Steffey loaned the witness the money to pay the purchase price. On page 2681 the witness testifies that he thinks Mr. Dwyer handed him the deed to sign just a little piece from the witness' home. On page 2682 the witness qualifies such statement and states:

"A. I think Mr. Dwyer is the man who handed me the paper.

Q. To refresh your memory, I will ask you, Mr. Jolly, if you don't remember that he (meaning Mr. Steffey) told you that you would have to send the deeds down to Lewiston and put them in escrow until the abstracts were procured and the abstracts examined, and the title was found to be all right before you could get your money?

A. Oh, yes, he told me that, but I am pretty positive that Mr. Dwyer gave me the money (meaning deed), although I may be mistaken. I find that I have been mistaken on several points.

* * *

A. Well, I wouldn't contradict him on it: I possibly may be mistaken in the one. But I remember distinctly where I received it."

On page 2683 the witness states that he remembered the price arrived at and agreed on was $850, which included the money which Mr. Steffey had loaned and the $200 location fee.

At the bottom of page 2683 the witness testifies:

"Q. Then you had no agreement for the sale of your land until after you had made your final proof?

A. None whatever."

The witness also testifies that the affidavit made at the time he filed his sworn statement was true. The witness also identified Defendants' Exhibit "Z," which is in substance the same as the defendants' Exhibit "D" found at page 4160 of the record,

and states that the affidavit is true. This affidavit was signed at the instance of Harvey J. Steffey.

EFFIE A. JOLLY.

The evidence of Effie A. Jolly is in substance the same as the evidence of her husband James T. Jolly, and is found on pages 2689-2717 of the record, to which we call the Courts' attention, and especially to the cross-examination of the witness Effie A. Jolly. The evidence is insufficient to show or establish fraud in relation to these two particular entries, and certainly insufficient to show that the defendants, or either thereof, was a party to the fraud, if any did exist, or had any knowledge of the same. The entry should be held intact.

CHARLES S. MYERS.

The evidence of Charles S. Myers is found at pages 602 to 620 of the record. On page 602 the witness testifies to his residence, business or occupation, and at page 603 testifies to his taking up a timber claim, and what induced him to take up a timber claim. On page 604 the witness testifies:

> "A. Why—well, I hardly know how—in the first place there was other people taking up

claims there and I was acquainted with this man Steffey, and he was locating, and I told him I wouldn't mind taking up a claim myself.

Q. That was Harvey J. Steffey, was it?

A. Harvey J. Steffey, yes sir."

On page 605 the witness testifies:

"A. He told me he could get me a claim; as near as I can remember now he said it wasn't a very good claim, but he said I could make $150 out of it anyway.

Q. What was your understanding as to what you were to do to make this $100 that you speak of?

A. The $100 or $150 do you mean?

Q. The $150.

A. Why, I supposed that if I wanted to I could sell the claim then and get the money out of it.

Q. And was that your understanding as to what you were to do with it?

A. I understood that I could sell it, yes. He just told me I could make $150, and of course I knew there was timber claims changing hands."

The witness testifies that he borrowed the money from Steffey with which to pay his expenses, and also to pay the purchase price of the land. The witness also testifies to going upon the land, examining the same, to his making final proof, and to his selling the land. On cross-examination, at page 616, the witness testifies:

"Q. Mr. Myers, your transactions with Mr. Steffey were simply that if you wanted to bor-

row the money, or didn't have the money yourself with which to pay for the land, he would loan you the money?

A. That was the understanding, yes.

Q. You had no contract or agreement to sell him the land at the time you made your filing, did you?

A. I had not.

Q. Or at the time you made your final proof?

A. No, sir.

Q. You had no contract or agreement that you was to sell the land to anyone at the time you made your filing, did you?

A. I did not.

Q. And had some one else offered you $500 more than Mr. Steffey had offered you, and Mr. Steffey wouldn't give that amount, you would have felt perfectly free to sell it to the other party, would you?

A. I would have by putting up the money he loaned me."

The witness also testifies on page 617 that the affidavit he made at the time he filed his sworn statement was true. The witness also identifies the affidavit he made about the time he transferred the land, which affidavit was introduced in evidence and marked Defendants' Exhibit "A," which affidavit the witness states is true. The affidavit appears at page 4121 of the record and was executed at the request of Harvey J. Steffey.

The evidence is insufficient to show any fraud in connection with this entry, or that there was any contract or agreement with Mr. Steffey or anyone

else for the purchase of this land. There was no understanding or agreement between the witness and Kester, Kettenbach or Dwyer. If any agreement or understanding did exist between Steffey and the witness, the defendants Kester, Kettenbach or Dwyer had no knowledge of it. This entry should therefore remain intact.

JANIE MYERS.

The evidence of the witness Janie Myers appears at pages 620 to 636 of the Record and is in substance the same as the evidence of the witness Charles S. Myers. She testifies, however, that she had no contract or agreement with anyone for the sale of her land prior to final proof. On page 633 the witness testifies as follows:

> "Q. You had no arrangements with Mr. Steffey that you would sell him the claim, or sell the claim to anyone, before you filed on it, did you?
> A. No, sir.
> Q. And you had no such arrangements before you made your final proof?
> A. No, sir.
> Q. And you didn't understand that you was under obligations to sell the claim to Mr. Steffey or to anyone else, at the time you filed on it, or at the time you made your final proof?
> A. No sir."

On pages 633 and 634 the witness testifies that the affidavit she made at the time she filed her sworn statement was true. She also identifies the affidavit she executed about the time she transferred the land, and on page 635 states that the affidavit is true. This affidavit was executed at the request of Harvey J. Steffey. We respectfully submit that the evidence is insufficient to show fraud in connection with this entry, and that the entry should remain intact.

We have now reviewed briefly the evidence of the witnesses in relation to these particular entries, and have observed that all of the witnesses testified that it was their understanding that no contract or agreement existed for the purchase and sale of the land; that they borrowed the money from Mr. Steffey with which to make final proof; that they never at any time had any discussion with either Kester, Kettenbach or Dwyer regarding it, and in sofar as the entrymen knew, Kester, Kettenbach nor Dwyer knew anything about any arrangements they had with Mr. Steffey for the loan of any money or for the sale of the land. We then have the unsupported evidence of Harvey J. Steffey that he had told William Dwyer the circumstances surrounding these entries, and his arrangements had with the entrymen for the

purchase of the land. These statements are denied by Mr. Dwyer, and it will be observed that Mr. Steffey is in conflict with each and all of the entrymen as well as in conflict with Mr. Dwyer. There is such a wide variance between their evidence that it cannot be reconciled. Either Mr. Steffey or all of these entrymen and Mr. Dwyer must have testified falsely. Mr. Steffey testifies that he had some conversation with William F. Kettenbach relative to obtaining the money for some of these entrymen to make their final proof. That Kettenbach did arrange for the money. It is significant that this money was obtained by Mr. Steffey from the bank by Steffey drawing his check on his account for the same. None of it was furnished by either Kester, Kettenbach, or Dwyer. When the lands were finally purchased, the money was paid and the matter was closed, the same as any other ordinary transaction wherein lands were being purchased.

On pages 1825 and 1826 Mr. Steffey testifies on cross-examination to Mr. Dwyer going with him and looking over the land. He testified on direct examination that Mr. Dwyer went and looked over the land prior to the time the entrymen had filed on the same; and Mr. Steffey testifies further as follows:

"Q. Dwyer told you that he would give them $200 over and above expenses?

A. Yes, sir.

Q. Had Dwyer gone and looked at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolly's claims.

Q. Did he know that Mrs. Loney and Mrs. Jolly were going to take those claims?

A. *I think they had already taken them when he looked at them.*

Q. *Hadn' they already filed on them?*

A. *Yes, sir.*

Q. *Hadn't they made their final proof, too.*

A. *I don't think they had.*

Q. To refresh your recollection, wasn't it after they made final proof and just before they made the deeds that Mr. Dwyer went up and looked at them?

A. *Possibly*, but I don't recollect it.

Q. *That may have been the case?*

A. *It may have been.*"

It will be observed that this admission of Mr. Steffey is in support of the evidence given by Mr. Dwyer; that after these entrymen had made their final proof and Steffey came to Kester and Kettenbach with the proposition of selling them the land, that he, Dwyer, went and looked the lands over and reported that some of the claims were fair claims and others were not worth purchasing; that Steffey finally went to Kester and told Kester that some of the claims were extra good ones, and others poor,

but they would average up well, and Kester finally bought them against the report of Mr. Dwyer.

The witness further testifies on page 1826 as follows:

"Q. Didn't you go down and see Kester about it, and explain to Kester that some of them were poor claims and others were good ones and he had better take them?

A. No, I never told Kester that.

Q. Didn't you tell Dwyer that?

A. No, I don't think I did.

Q. You may have told him that some of them were not very good but that others were good and they would average up all right?

A. Possibly I may have told him that; very likely I did.

Q. And in that way he concluded to take the claims?

A. I don't know what he concluded to do.

Q. But he did finally take them.

A. He took them.

Q. What did he pay you for them?

A. He didn't pay me anything for them.

Q. What did he pay for the claims?

A. He paid these people $200; they all got $200.

Q. You had already paid that according to your testimony.

A. No, I hadn't already paid that.

Q. Well, it was charged up to your account, wasn't it?

A. Well, I don't know whether it was or not.

Q. *You had given your checks for it.*

A. *Yes.*

Q. And they were paid, the checks were paid, and they were returned to you charging the

same as other checks you drew on the bank, were they not?

A. Yes, sir.

Q. Then they must have been charged up to your account, were they not?

A. Well, this money wasn't paid finally until the lands were deeded over to Kester and Kettenbach.

Q. Well, you drew the money, didn't you?

A. I did.

Q. On your checks?

A. Yes, sir.

Q. And passed it over to these entrymen, is that right?

A. The entrymen got their $200.

Q. Well, now then, how did you get your money back, how was your settlement made?

A. I didn't get any money back.

Q. How was your settlement made?

A. The settlement was made when the——I don't know how they did make the settlement; I never paid any attention to my checks afterwards. I supposed they straightened those things out themselves.

Q. Well, you got your checks back, didn't you?

A. Yes.

Q. When did you first begin to pay some attention to your checks?

A. Well, I always paid attention to my checks.

Q. You always paid attention to your bank account?

A. Usually, yes.

Q. And you was depositing money and checking it out?

A. When I had money.

Q. And you frequently overdrew at the bank, did you not?

A. Yes, sir.

Q. And frequently borrowed money from the bank?

A. Occasionally, yes.

Q. Now then, the account was checked on for this money just the same as any other check you drew on the bank, was it not?

A. Yes, sir.

Q. Didn't you pay some attention to your bank account? How it stood, and how this settlement was made?

A. Every once in awhile I would get a statement, yes.

Q. Then you paid some attention, did you not, when you got the statement?

A. Oh, yes."

On pages 1830 to 1832 it will be observed that the witness is squarely in conflict with the evidence of James T. Jolly and Clinton E. Perkins, and on page 1831 the witness testifies:

"Q. I am asking you what you said. Didn't you tell Perkins that you couldn't make any agreement to buy the claims at that time, or sell it for him at that time?

A. I don't think I did.

Q. Will you swear that you didn't?

A. To the best of my knowledge I will, yes.

Q. You know whether you did or not?

A. Well, not exactly.

Q. Well, did you have any such conversation as that with him at all?

A. I don't think I did.

Q. You never told him you couldn't make an agreement with him?

A. Well, yes, I may have told him I couldn't make an agreement with him, but there was no such language used as 'sell the claim.'

Q. But you did tell him you couldn't make an agreement with him?

A. I think I did.

Q. You tried to make him understand that?

A. Yes, sir.

Q. That you couldn't have an agreement with him?

A. Yes, sir.

Q. And you so understood, didn't you?

A. Well, no, I didn't understand that.

Q. Do you mean to say that you was trying to lead Mr. Perkins into committing perjury and not knowing it?

A. Well, no, I didn't want him to commit perjury.

Q. You didn't want him to commit perjury?

A. No.

Q. Then the arrangements you made with Mr. Perkins was such that you made him understand that it didn't amount to an arrangement. Is that right?

A. Well, he understood it as well as I did. I don't know what I made him understand, but he understood it as well as I did.

Q. He nderstood that he didn't have any agreement as well as you did, didn't he?

A. Well, I don't know what he understood.

Q. But you remember that you did tell him you didn't have an arrangement; is that right?

A. Yes, sir.

Q. And you also had him sign an affidavit, Defendant's Exhibit 'D', for identification, as follows (P. 1833 Record):

State of Idaho,
County of Nez Perce, ss.

CLINTON E. PERKINS, being duly sworn, deposes and says: That he is the identical party who made entry of the lands hereinafter described under the Stone and Timber Act providing for such entry. That at no time prior to the entry or prior to the final proof did the affiant have any agreement or understanding, expressed or implied, that said entry was being made or said title being acquired for the benefit or advantage, directly or indirectly, of any person, company, or corporation. That said entry was made, and said title acquired, solely for the exclusive use and benefit of the affiant. That prior to the entry affiant had made personal examination of said land and here makes oath that to the best of his belief the same did not and does not contain any valuable deposit of gold, silver, cinnabar, copper or coal and was not mineral land under the terms of said act. That the sale now being negotiated is not the result nor made in pursuance of any agreement or understanding, expressed or implied, had at any time prior to final proof upon the hereinbelow described lands, and that the said purchaser is in no wise interested nor in any way had any interest in or to said lands, or the title thereto, directly or indirectly, prior to the negotiations for the present sale, and that such negotiations were commenced subsequent to the final proof and the acquisition of title by this affiant from the government. That the lands referred to are described as follows, to-wit: Lots number three and four, Section three, Township 36, North Range 5 East, Boise Meridian; the south half

of the southwest quarter of Section 34, Township 37 North, Range 5 East, Boise Meridian.

CLINTON E. PERKINS.

Subscribed and sworn to before me this 28th day of February, A. D., 1907,

WILLIAM J. TODD,
Notary Public in and for Nez
(Notarial Seal) Perce County, Idaho.

Q. You had him sign that affidavit, did you?
A. I think so.
Q. Is that affidavit true?
A. As far as it went I guess it is, if he signed it.
Q. You say the affidavit is true, do you?
A. That he signed it; yes.
Q. Yes, he signed the affidavit and swore to it. You can examine it if you like Handing paper to witness)."

It will be observed that Mr. Steffey is highly prejudiced against the defendants, that he is willing to commit perjury himself and subornation of perjury in order to injure the defendants in some way. It is not clear from the evidence just what the trouble was, or what brought it about; but Steffey has some sort of an imagination that he was not treated fairly, or that he should have received something to which he was not justly entitled, or for some reason he desires to cheat, wrong, defraud and injure the defendants. He apparently would be willing to serve a term in the penitentiary if he could succeed in causing the defendants to serve a term there. He

admits that he testified falsely when he appeared as a witness for these various entrymen, and we call the Court's attention to his evidence at page 1839 to 1841 of the record where the witness states that he told the witness Bonney that he had no agreement with him, and also where the witness testified in the next paragraph or on the same page that he swore falsely when he appeared as a witness for the entryman at the land office, and where he admits on pages 1841, 1842 and 1843 and succeeding pages that he swore falsely; one of the questions being as follows:

"Q. And you signed the testimony of the witness Harvey J. Steffey, plaintiff's Exhibit 11, did you? That is your signature, is it?

A. That is my signature, yes.

Q. Do you remember testifying as follows: 'Do you know whether the applicant has directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself,' to which you answered: 'No.' You so answered, did you?

A. Yes, sir.

Q. Was that answer true or false?

A. It was false.

Q. You knew it was false at the time, did you?

A. Yes sir."

Question 11 is to the same effect, as well as succeeding questions. It seems that it would be most unjust to take the evidence of a witness who admits that he deliberately went before an officer authorized to administer oaths and swore falsely at one time, and weigh his evidence against the evidence of several highly respected citizens of the state, whose evidence is consistent with the truth and who are supported by the facts, circumstances and documentary evidence, which supports and sustains their testimony, and which squarely contradict the testimony of the witness Harvey J. Steffey. We believe that the Court will not weigh the evidence of Harvey J. Steffey against that of all the entrymen, and the entry women, especially in view of the fact that Harvey J. Steffey admits that he committed perjury, that he suborned perjury, and that he appears as a witness willingly and testifies against the defendants for the express purpose of injuring the defendants and in an effort to deprive them of their land,

In connection with these entries we call the Court's attention to the evidence of George H. Kester, found on pages 3171 to 3173 of the record. On page 3171 the witness Kester states that he and the defendant Kettenbach purchased the land.

"Q. Will you state fully all that you know about it, and what connection you had with it?

A. Well, about all I know about this transaction is that we bought several claims there from Mr. Steffey, on the information of Mr. Dwyer as to the value of the land; that is, there were part of them that we bought on estimates that Mr. Dwyer O.K.'d, and there were some that we bought without his O.K.

Q. Do you remember what ones were bought without Mr. Dwyer's O.K.?

A. I believe it was Mrs. Bonney and Mrs. Jolly, if I remember correctly.

Q. Do you remember whether it was Mrs. Loney or Mrs. Bonney?

A. Or Mrs. Loney, I guess; perhaps that is it."

On page 3172 the witness testifies:

"Q. Now, I will ask you to state whether or not you had any notice or knowledge of any understanding or agreement that Mr. Steffey had with these entrymen, before they filed or before they made their final proof?

A. No sir.

Q. When was the negotiations begun for the purchase of these lands, in relation to the time when they made final proof?

A. After they made final proof, in every case.

Q. After they made final proof?

A. Yes sir.

Q. Do you remember the first thing that was brought to your notice or knowledge or attention concerning the purchase of these lands?

A. Well, as to the particular land, only when they were ready for sale, after they had made their final proof.

Q. Have you read the evidence of Mr. Steffey that he gave when he was upon the stand?

A. Yes.

Q. Did you read his evidence wherein he testified that he had a conversation with Mr. Dwyer, in your presence, before the entrymen filed on their lands, concerning the sale of these lands to you, and that he told you that one of the claims was better than the Dell Maris claim and that either you or Mr. Dwyer said if it was you would have a champagne supper, or words to that effect?

A. I believe that something of that kind occurred, but that was at the time of the purchase of the Clint Perkins claim, as I remember it—at the time that claim was purchased; and that was his reasons for the consideration, as I remember, in that deed at that time.

Q. And was the deed executed at that time?

A. Yes, sir.

Q. And it was after the final proof had been made on all of the claims?

A. Well, I think that occurred at the time of the closing up of that Clint. Perkins deal.

Q. I see that you included a consideration of $1,250 in the Clint. Perkins deed. I will ask if you remember what you gave for that claim, whether or not the consideration mentioned in the deeds are the exact consideration?

A. Yes, sir.

Q. $1,250, is that what you paid Mr. Steffey for it?

A. $1,250, yes sir, was paid for this claim.'

The witness testifies concerning the James T. Jolly claim for which was paid $850 and Effie A. Jolly claim, for which was paid $900.00; that $950

was paid for the Mary A. Loney claim, and that $1000.00 was paid for the Charles E. Loney claim. The Charles S. Meyers claim $1000.00, Janie Meyers $450.00 for 80 acres; Frank J. Bonney $950.00.

We now call the Court's attention to the evidence of William Dwyer in relation to these particular entries, and especially to page 3341, wherein he stated that he heard the evidence of H. J. Steffey in relation to the particular claims; that he knows the entrymen and entrywomen Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers, and Clinton E. Perkins, and that Steffey located them upon these timber claims.

(Page 3342).

"A. Why, yes, I remember him saying something about it to me once.

Q. What did he say?

A. He said he had located them.

Q. He had located them?

A. Yes sir.

Q. What was the next thing?

A. I said, 'How much timber is there on them?' 'Oh,' he says, 'they are pretty well covered with timber.' I says, 'No, they aint' they can't be.' I says, 'They lay right within a couple of miles of Pierce, and that land has been cruised and cruised and re-cruised by the Potlatch Lumber Company, by the Wisconsin Log & Lumber Company, and by the Western Lumber Company, and by everybody.' and I says 'that

aint good timber land.' 'Well' he says, 'it is pretty good average.' And I says, 'Well, I know it aint. I'll tell you what you might have done with that land; If you could have located the best forties and scripped it you could probably have got out whole on it.' 'Well' he says, 'you might go and look at it. Those are all friends of mine, and I told them I would locate them.'

Q. Now, was that before or after they had made final proof?

A. Why, I think it was about the time they made final proof.

Q. About the time they made final proof?

A. Yes sir. There was some of those claims, now, later on—there was two of those claims that was up on the road, and we had quite an argument about them claims. I just absolutely refused to buy them at all. I says, "Any man that would go to work and locate such timber lands as those, and then try to sell them.' 'Well,' he says, 'I went good for them people,' he says, 'I loaned them the money.' And he says, 'I am going to sell them.' I said, 'All right; you cant sell them wtih my estimate, because I aint going to O. K. any estimate on them lands.'

Q. And then what happened?

A. Well, he sold them to Kester.

Q. And—

A. And we had some trouble, too, also, about the Perkins claim. Mr. Kester said I O.K.'d them, but I really didn't O. K. He bought that, too. That was that claim he paid $1250 for. He said it was as good as the Dell Maris claim. Well, I knew it wasn't. I just wanted to correct that mistake. I didn't O. K. that claim.

Q. Did you hear Steffey's statement where in he said he had a conversation with you in the presence of Kester before these entrymen filed,

that one of these claims was as good as the Dell Maris claim, and that you said if it was you would have a champagne supper, or words to that effect?

A. Yes, sir.

Q. Now, what was there about that?

A. Oh, no, that wasn't—that was the day that he sold that claim.

A. That he sold the Perkins claim?

A. Yes.

Q. After they had made their final proof?

A. Yes, after they had made their final proof.

Q. And did you have any understanding or agreement with Steffey for the purchase of these claims, before the entrymen made final proof?

A. No sir, I didn't.

Q. Now, did you ever at any time enter into a conspiracy, combination or understanding with Kester and Kettenbach, or anyone else, that you would defraud the United States out of any timber lands, or anything else?

A. No, sir.

Q. And have you ever had any connection with Kester and Kettenbach in the acquisition of timber lands, further than working for them for a salary, or for wages, or for a commission?

A. That's all, the same as other people that I have worked for.

Q. Did you hear the evidence of H. J. Steffey wherein he stated that you used an expression of 'up-the-creeking-them' when you located them on timber land without taking them to the land?

A. Yes sir.

Q. What is there about that, if anything?

A. I never heard it before. I guess he heard that up Priest River.

Q. Did you ever locate anyone on a tract of timber land without taking them upon the land?

A. No sir, I never did. Or on a poor one, either. If I didn't have a good one I didn't locate them at all."

Here the witness testifies concerning his sending Steffey out to locate Margaret Goldsmith and Blakeman on timber land; that he procured the necessary horses, and Steffey was directed to take them to the land; that the witness never knew that Steffey had not taken them to the land until some time afterwards, and at the bottom of page 3345 and top of page 3346 the witness testifies:

"A. Why, I was up there on the fire patrol, watching the fire, and Steffey came in there one day and he was awfully excited, and he said that there was a fellow by the name of Hinds from Kendrick, had come down here and protested Mrs. Andrews' claim, or in regard to their being on the claim, and he said that they had J. B. Anderson and Miles Johnson, and he says, 'They are all around there,' and he says, 'I am afraid they will indict me.' I says, 'What did you do to be indicted for?' 'Well,' he says, 'I didn't show them on the land.' I says, 'Why didn't you?' 'Oh,' he says, 'we never did.' He says, 'Jack Maloney and I, we never showed anybody land that we located them on.' I says, 'Do you mean to tell me you didn't show Mrs. Goldsmith and Blakeman that land?' He looked about a minute, and he says, 'By God, Bill, I didn't. I never told you before, but you ought to have known it by the length of time it took me.' 'Well,' I says, 'you are certainly a daisy, to swear to a lie, when that land is right on the

road.' And that is the first I knew that they hadn't been on the land.

Q. Did you ever have anything to do with locating Jane Andrews?

A. No.

Q. Or selling the relinquishment?

A. No.

Q. Or the purchase of the land?

A. No, I didn't."

BILL IN EQUITY No. 406

The charges in this bill involve the land of the various entrymen upon which final proof was made, and most all of which has subsequently been transferred to the defendants, or some of them, and by the defendants transferred to other purchasers.

We will briefly call the Court's attention to the evidence bearing upon the land of each individual entryman, and will refer to the same by the name of the entryman. A full description of the land, and the names of the various entrymen, will be found at pages 4249 to 4261 of the record.

WILLIAM B. BENTON.

The name of the first entryman is that of William B. Benton, appearing in bill of equity No. 406. The land embraced in his entry is set out and specifically

described at page 4249 of the record. This land was subsequently transferred to the Clearwater Timber Company.

The only evidence in support of the bill applied to this entry is the unsupported evidence of Clarence W. Robnett, which is contradicted by the evidence of the entryman, which will be found at page 3517 of the record. We do not feel called upon to set out and copy the evidence of the entryman W. B. Benton, but respectfully ask the Court to read the same in its consideration of the case.

JOEL H. BENTON.

The evidence in relation to the land embraced in the entry of Joel H. Benton is substantially the same as that in relation to the entry of William B. Benton. Robnett is in conflict with the evidence of the entryman, Joel H. Benton, and his is practically all the evidence relied upon by the Government in its attack upon this entry.

The direct examination of Joel H. Benton is found at pages 636 to 671 of the record.

On page 638 of the transcript appears the evidence relative to an understanding between the entryman and Clarence W. Robnett concerning the taking

up of a homestead. The evidence of the witness, found at page 637, is as follows:

> Q. Had you located a homestead prior to that time?
>
> A. I had started to take up one, yes, sir; gone onto one, but never filed on it.
>
> * * * *
>
> Q. What was that arrangement?
>
> A. Well, it was that he should—I would take that up and go on to the land and stay there until it was surveyed, and he was to furnish the money for the expenses while I was there. And then after final proof I was to let him have the land.
>
> Q. Where was this homestead you refer to?
>
> A. In 39-4.

On page 637 the witness also testified concerning his taking up a timber claim under the Timber & Stone Act:

> A. Why, I don't know; everybody was talking about it, the whole town, I don't know. W. A. Smith located me; I think I spoke to him myself."

The witness on page 641 also testifies concerning his taking up a timber claim:

> Q. Did you have any conversation with Robnett then about taking up a timber claim?
>
> A. It was very slight. Mr. Smith came in at the same time and—
>
> Q. I am speaking now about Mr. Robnett.
>
> A. I was going to tell you; Mr. Smith came in at the same time, and we all talked together, and Mr. Robnett mentioned, if Al. could find

me anything to locate me on he would see me through. That is as far as I remember.

Q. Was that the only conversation you had with him about it?

A. Yes, sir.

Q. Was he to furnish you money the same as for the homestead?

A. No, sir; there wasn't a word said about him furnishing me the money; wasn't a word said.

Q. Do I understand you that you didn't take up a timber and stone claim at the request of Mr. Robnett?

A. No, sir; I did not.

* * * *

Q. Did he tell you he would furnish you the money?

A. No, sir; he didn't say that at all.

On page 665 of the record the witness testifies, on cross-examination, as follows:

Q. Mr. Benton, did you ever have any contract, agreement, or understanding in regard to the sale of this land or the conveying of it prior to the time you filed your sworn statement and prior to the time you made your final proof, with William F. Kettenbach, George H. Kester or William Dwyer?

A. No, sir.

Q. And as I understand you, you had no agreement for the sale of your timber claim prior to the time you filed your sworn statement and prior to the time you made your final proof with anyone?

A. No, in fact there was nothing said about it at all.

On page 667 the witness testifies that he had made no contract or agreement to convey the land to anyone prior to the time of filing his sworn statement, and prior to the time he made his final proof.

On page 667 of the record the witness testifies:

> Q. I will ask you, Mr. Benton, if during the talk with Mr. Robnett, if he said anything to you about not letting Mr. Kettenbach or Mr. Kester know of his purchasing the land, or of his arrangements with you?
>
> A. He told me several times he had no connection with them whatever, that he had nothing to do with them at all. It was on his own account. * * *
>
> Q. And what was his actions in regard to them not knowing what he was doing in regard to the land? State whether or not he tried to keep that from them, or talked with them where they could hear you?
>
> A. He did; he tried to keep it secret.
>
> Q. He tried to keep it from them?
>
> A. Yes, sir: he took me out in the Directors' room and he did not want anybody to hear what he was doing.

The evidence of this witness is important as bearing upon the actions of Robnett, and is in contrast with the evidence which he has given upon the stand, that Kester and Kettenbach knew of his relations with the various entrymen and knew of the circumstances under which he acquired title to the land. The evidence is material also in that it impeaches the evidence given by Robnett. The witness was pro-

duced by the Government, and they are bound by what he says.

GEORGE W. HARRINGTON

There is no evidence in support of the charges against this entry, and, even if there was, it has long since been conveyed to the Western Land Company, and there is no evidence of any kind or nature that this Company had any knowledge of any irregularity in acquiring the title.

VAN V. ROBERTSON.

The evidence of Van V. Robertson in support of this entry is found at pages 774 to 795 of the record; his cross-examination at 792 to 795. The evidence of this witness shows conclusively that there was no fraud in connection with this entry, and the land has long since been transferred to the Lewiston National Bank.

On page 792 the witness testifies, on cross-examination, as follows:

> Q. As I unedrstand you, Mr. Robertson, you had no agreement with Mr. Robnett, or anyone else, to sell him the land?
>
> A. No, sir.
>
> Q. Prior to filing your sworn statement?

A. No, sir.

Q. And you had no such agreement at the time you made your final proof?

A. No, nor no time afterwards.

On page 793 of the record the witness states that the affidavit he made at the time of filing his sworn statement was true.

JOHN W. KILLINGER

The evidence in relation to this entry is very meager, and wholly insufficient to sustain the charges of fraud or even of irregularity in the matter of acquiring title to the land. Then, it has long since been transferred to George E. Thompson, who is an innocent purchaser for value, and without notice.

JOHN E. NELSON

The evidence of John E. Nelson appears at pages 1038 to 1057 of the record. The evidence is insufficient to show any fraud or irregularity in relation to his acquiring title to this tract of land. Then, if the evidence was sufficient, the land has long since been transferred to Elizabeth Thatcher, who was an innocent purchaser, for value, and without notice.

On page 1040 of the record, the witness testifies:

Q. And did you make any arrangements with him (Robnett) about the claim?

A. Absolutely none.

On pages 1055 and 1056 the witness testifies, on cross-examination, that he made no agreement or contract to sell the land prior to the time he filed his sworn statement, or prior to the time he made his final proof.

SOREN HANSEN

The evidence of Soren Hansen in relation to the acquisition of title to this tract of land appears at pages 512 to 532 of the record; his cross-examination at page 527.

At pages 516 and 517 the witness Hansen testifies to a conversation with Clarence W. Robnett in relation to his taking up a tract of land, which conversation was in part as follows:

> A. Why I met him one day on the street, and he says, "Don't you want to take a timber claim, George?" And I said no. I told him I didn't want no timber claim, I didn't have time to go after it; I didn't have the money to spare; I didn't want to put money into a timber claim. And he said he would tend to the whole matter and that it wasn't necessary for me to go up there.
>
> Q. What did he say about the money?

A. Why he said he could furnish the money, or get the money for me, whichever it was.

Q. And now were you to get anything out of that timber claim, or how was that?

A. Why, I asked him what there was in it, and he said, "I ought to be able to get you from three to five hundred dollars out of the place."

Q. How were you to get the three or five hundred dollars out of it?

A. Why, when he sold it. He said he would be able to sell it; he had more claims, and he would be able to sell it for me.

On page 522 the witness testifies to the execution of deeds to the land, and testifies concerning the execution of the deed dated February, 1906.

A. Why, Clarence he came to me one day and says, "I got a chance to sell that timber claim for you, and if you will make out a deed to it, why I will, I can turn it over to them whenever it is sold, and I wont have to call on you." So I made out the deed.

Q. Now, the next deed you identified, dated May 16, 1908, running from Soren Hansen and wife to E. W. Thatcher, do you remember the circumstances of making that deed?

A. Yes, he wrote up to me, he sent the deed, it was already filled up, sent it up to me, and wrote to me to fill it out and have it proved, prove it before a notary public and have it signed and acknowledged and sent down to him.

The witness also testifies to the execution of the deed running to William F. Kettenbach, and that he executed the deed and sent it down to Robnett; and also the deed to the Clearwater Timber Com-

pany; and on page 524 testifies that Mr. Robnett gave him $60 when he executed the deed to Mrs. Thatcher.

In relation to this entry we call the Court's attention to the evidence of William F. Kettenbach, found at pages 1689-90-91 of the record, wherein the witness Kettenbach testified that he was familiar with the manner in which the deed was acquired for the Clearwater Timber Company. Beginning on page 1689:

> Q. I wish you would tell what you know about that claim, and what your connection with it is?
>
> A. Well, it was—I don't just exactly remember the date, but I remember that Robnett (who was in the bank) spoke to me one day about having a claim for sale.
>
> Q. That is the defendant Robnett?
>
> A. Clarence Robnett, yes. And that he had a deed there in the bank for the claim all signed up by this man Hansen, but there was no grantee in it at all. He said that the man was hard up, and was owing a mortgage on the claim and which mortgage they were going to foreclose on him, and he would like to sell it. And he asked me if I couldn't make some disposition of it; and so I told him I would look around and see, and I went to Nat Brown of the Clearwater Timber Company and gave him a description of the claim and asked him if he could make an offer on it, and he said he would look up his estimate and see if he had an estimate on that particular piece of ground, and I think it was

a few days after that he told me what he could pay for it. Well, I says, "Brown, it can be handled all right, and if you say you will take it, why, I will get it for you," so he says, "All right." I had several dealings with Brown along the same line, so I went to Robnett and I says: "Well, Nat Brown will take the claim, and how much does the fellow want for it." In fact, I think Robnett had told me how much it would take, anyway, before to get it. Well, he says, "Mrs. Thatcher has a mortgage of a thousand dollars with interest on it, and it will run up quite a bit, but if they can get the principal they will take the thousand dollars even money." Well, I says: "All right, I will have Curtis Thatcher come in and pay him the thousand dollars, because I have already an abstract on the claim."

Q. And you paid the thousand dollars and obtained a relinquishment—

A. A release of the mortgage. And recorded the release of the mortgage.

Q. That was your own money that you paid?

A. That was my own money that I paid, yes, sir. And then I paid over to Robnett, or saw Robnett pay Hansen; I don't know whether I paid any or not to Hansen, but whether I paid Robnett and he paid Hansen, I am not sure; but I know Robnett got the money, and was to pay Hansen the $60, because he had to pay $60 over and above the mortgage. $1060 was what the claim cost me, plus the abstract.

Q. Then the deed was made to the Clearwater Timber Company?

A. The Clearwater Timber Company.

Q. Then what happened?

A. Well, as I was going along with the abstract, I had ordered the abstract made up, and

after I had paid the mortgage and paid Robnett to pay Hansen, I got the abstract, and then I found there was a lis pendens on the claim which was a surprise to me. I didn't know anything about that. I figured that the only suits there were, were on our own lands, and I run on to this lis pendens. And in the meantime Brown had given me a deed drawn up—they have a separate form of deed, different from anybody else—and he had given me one of their deeds to have him execute, and if they was paid all the money and everything, the claim was to go to Brown. Of course, I was acting more in the position of a vendor, you might say, but I was paying out my own money and doing all of this, and when it was turned over to Brown I was to get my money back. Well, as I say, as soon as I got the abstract, I noticed this lis pendens ,and I went to Brown and I told him, I says: "Brown, here is a lis pendens; I didn't know it until I got the abstract." He says, "The claim has never belonged to us, and it must be a mistake that they are sueing on that claim," and I says "Couldn't you take it to your attorney and find out?" And he did that; and then of course he couldn't take it.

Q. Then you asked for a deed to yourself? (Page 1692 of the record).

A. Then I asked for a deed to myself.

Q. And you prepared the deed?

A. I prepared the deed, and gave it to Mr. Robnett.

Q. And that is the deed that was offered here in evidence, wasn't it? (At 1692-3 of the record).

A. Well, I didn't know it had been offered in evidence. But the condition was this: It was just about that time, Mr. Gordon, where things

got to that stage where this bank trouble came up, the first exposure of the thing and, I had my money tied up in it, and I felt that Robnett was naturally not interested in me any more or in us, and it seemed apparently he had not been for quite a while, and I was there with my money out, and nothing to show for it. There was no reason why Robnett could not have gone to Hansen and got a deed to myself, so I took the matter in my own hands, and on my own volition I took the deed I had used, conveying the land to the Clearwater Timber Company, and put that on record, feeling that I could go to them and that they would quitclaim back to me, and in that way I could protect myself, and that is the reason I did that.

The witness Hansen testifies, on cross-examination, at page 528-529 of the record, that the affidavit he made at the time of filing his sworn statement was true; that he had no agreement to sell the land to anyone prior to the time he made his final proof.

E. N. BROWN.

The evidence of the witness E. N. Brown appears at pages 1667 to 1687 of the record, and is the same in substance as the evidence given by William F. Kettenbach.

JAMES C. EVANS.

The evidence in relation to this entry is very meager, and the evidence of Clarence W. Robnett, unsupported as it is, is insufficient to show fraud in connection with this entry. The entryman, James C. Evans, did not appear and testify, but we call the Court's attention to the evidence of C. W. Colby, at pages 3081 to 3111 of the record, in relation to this entry, which shows conclusively that there was no fraud or irregularity in the matter of the acquisition of title to this land.

C. W. COLBY.

At pages 3080 to 3085 the witness Colby relates in detail all of his transactions in relation to the entries of the various entrymen, among them being James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith and others, in which the witness states (page 3082):

> "A. Well, these entrymen were in the employ, had been for some time in the employ of Small & Emery, except perhaps Mr. Dent, who wasn't particularly employed by them, but had considerable dealings—he kept a house at which they stopped in going and coming, and also kept some goods, and they got goods from him in going and coming from Lewiston to the timber, and these —there was a good deal of talk about taking up

timber and these parties concluded that they wanted some, and Mr. Emery had been engaged in locating parties on timber, had made a business of it, and finally located them on timber."

At page 3084 of the record the witness testifies concerning the borrowing of the money with which to make final proof; that he finally spoke to William F. Kettenbach regarding a loan of money, as Mr. Skinner and other parties had failed to make the loan, and the witness says in part (3084 of the record):

"A. Yes, sir; and asked him (meaning Mr. Kettenbach) for a loan of this money to prove up with, and I think he said he would speak to Mr. Kester about it, and let me know in a short time, or perhaps let me know in the morning; anyway, it was only a short time he took to give me an answer. * * *

A. I mean made proof; yes, sir. Excuse me. When they were ready for the money, I got the money from the bank and handed it to them, and they went and made their proof.

MR. TANNAHILL: Then what happened after they made their proof?

A. Well, Mr. Kettenbach says: 'Now,' he says, 'I look to you, Mr. Colby, to get those mortgages and see that this thing is all straight,' and so I waited around until they made their proof, and when they did, I asked them to go up to Mr. Barnett's office—I went up into Mr. Barnett's office before this, and told him the boys were making proof and I would like to have them give a mortgage, and told him I would like to have him remains in his office—it was getting late in

the evening then—and I wanted him to remain there to fix up these mortgages and he said he would and did. * * * Emery came up and says: 'The boys want to sell instead of giving a mortgage. They say they will have the same trouble about meeting the mortgage they are having now, and prefer to sell, if they think they can get a reasonable price." and asked me if I thought Mr. Kettenbach would buy it, and I says: 'I think not: it is so soon after proving up, but.' I says, 'I will go and see him.' I went and saw Mr. Kettenbach and he says: 'Have they proved up?' and I says, 'Yes.' 'Have they got their final receipts?' and I says, 'Yes.' 'Well,' he says, 'it as much theirs now as it will ever be,' and he says, 'Yes, I will buy them if I can get them right,' and he says, 'What will they cost?' and I says, 'They will average about $750 or a little less, some more.' 'Well,' he says, 'I will see Mr. Kester about it and let you know in a little while,' and I saw him again, and he says, 'We will take them if they don't cost more than $750,' so then I told Mr.Emery that Mr. Kettenbach would buy them, and what he would give, and Mr. Emery seemed to understand by that what the boys wanted for them, and instead of making mortgages they made deeds (Page 3086 of the record).

On page 3082 of the record the witness testifies that he has known Clarence W. Robnett for twelve years: that he never talked with Kester about these claims at all. On page 3087 the witness states that he never came into the main body of the working room of the bank, at Kester's desk, or in Kester's private office, or at any other place, and made the

statement testified to by Robnett, in substance: "George, I came in to talk with you in regard to the timber matters' (meaning Mr. Kester), and did not state to Kester, "Fred Emery last Sunday cruised out some claims in 39-3, and we located six men on them. We are to furnish them with money and all expenses to prove up, and are to pay them each $200 for their right. Now we have fallen down on being able to get this money"; and the witness did not ask Kester if he would go ahead and take them up under the same arrangement, and take care of these parties; that no such conversation occurred; and on page 3087 of the record testifies:

> "Q. I will ask you if at the same time, or at any time, you stated to Mr. Kester, or anyone else, what the entrymen were doing, or that they were to go ahead and prove up, and deed the claims over to Colby and Emery, meaning yourself and Emery, for $200 each?
>
> A. No, sir; there was nothing of that kind. Nothing suggesting any such thing in the conversation at all."

The witness also states (page 3088 of the record) that he made no statement to Mr. Kester and Mr. Kettenbach, or either of them, that they should take the land over from the entrymen upon the same terms, and under the same agreement, as the agreement with Colby and Emery, and in answer to the question states:

"A. No; that whole conversation as related there is absolutely false from beginning to end. There was not a syllable of anything of the kind ever occurred. I never talked with Mr. Kester one moment about it. Not a word."

At succeeding pages of his evidence (3088 to 3092), the witness denies each and every conversation which Robnett claimed to have overheard, and stated that no such conversation ever took place.

FRED W. EMERY.

The evidence of Fred W. Emery, found at pages 3115 to 3138 of the record, is substantially the same as that of Mr. Colby and that of Mr. Kester.

LON E. BISHOP.

The same evidence applies with equal force to the entry of Lon E. Bishop. He is one of the entryman designated as the "Colby and Emery" claims; and we submit that the evidence heretofore quoted and referred to applies with equal force to this particular entry.

FREDERICK W. NEWMAN.

The same applies with equal force to the entry of Frederick W. Newman. Neither of these entrymen appeared and testified in relation to their entry.

CHARLES SMITH

The same condition applies in relation to the entry of Charles Smith, and we will not enlarge upon what we have heretofore stated.

CHARLES DENT.

The same condition exists in relation to the entry of Charles Dent. This entryman appeared and testified as a witness for the Government, his evidence appearing at pages 716 to 736 of the record. The most important evidence given in relation to this entry of the entryman is given from pages 716 to 721 of the record in which the witness states:

> "A. Mr. Emery was locator at that time, and he asked me if I had ever taken a claim, and I told him no; and he wanted to know why I didn't take one. Well, I told him I didn't know as I had much use for one; I couldn't sell it. 'Oh, yes,' he says, 'I could sell a claim most any time.' So I concluded I would take one.
>
> Q. Did he tell you how much the claim would net you?

A. Oh, I told him if I could get $100 for the claim I wouldn't mind taking one. 'Well,' he says, 'you can easy enough get $100.' He says, 'Most anybody will give you $100 for it.'"

The witness also states that he had part of the money at that time to purchase the claim. He also testifies to making his final proof, and to succeeding in selling the land; and on cross-examination the witness testifies that the first conversation with Mr. Colby, or anyone else, in relation to selling his claim, was after he had made final proof. On cross-examination (at page 741 of the record), the witness testifies that the affidavit he made at the time he filed his sworn statement—that he had no agreement to transfer or sell the land—was true; that he had no understanding or agreement with anyone to sell his land prior to the time he made his final proof.

EDWARD M. HYDE.

The evidence in relation to this entry is very meager, and shows no fraud or irregularity in relation to the acquisition of title to this tract of land. The witness did not appear and testify. The evidence of the defendants in relation thereto is very clear and complete, and it is unnecessary to refer to the same further.

DRURY M. GAMMON.

The evidence of Drury M. Gammon is found at pages 2101 to 2109. The witness testifies to the manner in which he acquired title to the land, and to the talk with Clarence W. Robnett regarding it, and on page 2102 the witness testifies:

> "A. Oh, I told him at first I didn't know (meaning Mr. Robnett), and I asked him how much there was in it if I wanted to take it up, and he asked me if I would sell my right, and I told him no, I wouldn't sell my right the way he wanted me to.
>
> Q. Well, how did he want you to?
>
> A. He wanted to know if I would take it up and sell it back to him for $100 clear of my expenses, and I told him no."

On pages 2103-4 the witness testifies that in subsequent conversations with Robnett, that Robnett was to pay so much for the timber on the land, and the purchase price depended on the timber. The witness also testifies that he paid his own expenses to view the land; and on page 2105 states:

> "A. Well, as I say, I paid my own expenses until after I got the land and see how much it would come to. He didn't say whether he was going to furnish me any money at the time. He asked me if I had the money to do all this, and I told him yes."

On cross-examination the witness testifies, Pp. 2111-2113):

(Page 2111) "Q. Mr. Gammon, you never had any arrangement with Kester or Kettenbach regarding your claim, did you?

A. No, sir."

The witness also testifies that he had no conversation with either of them regarding it.

On page 2112 the witness testifies:

"Q. After you had proved up on it then you figured up what timber there was on it and made the agreement then?

A. Yes, sir.

Q. And you had no agreement with him as to the price or what you should receive, or that you would sell it to him in fact before you made final proof?

A. No."

The witness also testifies that the affidavit he made at the time he filed his sworn statement—that he had no contract or agreement with anyone to transfer the land—was true.

GUY L. WILSON.

The evidence of Guy L. Wilson in relation to the acquiring of title to this tract of land appears in the transcript; his direct examination beginning at page 371, wherein he testifies to the manner of taking up the claim, his conversation with Mr. Dwyer in relation to his location and location fee: how he

came to visit the land, his filing on the land, and all of the circumstances leading up to his final proof.

"Q. Now, what arrangements did you go there to make with Mr. Dwyer about getting the money to prove up with?

A. I went to see him to get him to locate me on a claim, and see if he could procure the money for me to prove up with.

Q. Was Mr. Dwyer in the business of furnishing people money with which to prove up on timber claims?

A. I don't know; he was a locator.

Q. Well, what was said by Mr. Dwyer when you saw him on that occasion?

A. He said he thought he could borrow the money for me and get a claim in.

Q. Was that all that was said?

A. He said that I would have to pay him for locating me on the timber claim, and he told me about what the claim would be worth. That's about all that I can remember that was said there.

Q. What did he tell you the claim would be worth?

A. Well, he said that after expenses would be paid, and I had paid him for locating, it would probably be worth $150 to me."

On cross-examination, at page 429, the witness testifies:

"A. He (meaning Mr. Dwyer) told me that he thought he could get the money for me, and told me I would have to pay him for locating me."

And on page 431 the witness states:

> "Q. And regardless of what might have inadvertently crept or fallen in in those other trials or that other evidence, regardless of what might have been said during that time or those conversations, the evidence that you have given here on cross-examination is substantially correct to the best of your recollection?
>
> A. I think it is."

ELLA WILSON.

The evidence of Ella Wilson, wife of Guy L. Wilson, appears at pages 434 to 448 of the record. The witness testifies on cross-examination to having been present during the first converation between her husband and Mr. Dwyer, and was interrogated concerning her evidence given in a former criminal trial, and on cross-examination testified, in relation thereto, that she and her husband went over to see Mr. Dwyer about locating Mr. Wilson on a claim; that she heard the conversation between Mr. Wilson and Mr. Dwyer; that she heard Mr. Dwyer tell her husband that he thought he could get him a timber claim; that she heard Mr. Wilson ask Mr. Dwyer if he thought he could borrow the money to pay for the claim and pay his expenses; and on page 446 testified:

"Q. And did you notice, did you see Mr. Dwyer figure up about what the expenses would be; do you remember of seeing Mr. Dwyer with Mr. Wilson, your husband, figure up about what the expenses would be, and then Mr. Dwyer gave Mr. Wilson about the value of that claim at that time, or when he could sell it?

A. Yes, sir.

Q. Did you hear Mr. Dwyer tell Mr. Wilson that there ought to be $150 in it for the claim; that it ought to net him $150 when the claim was sold?

A. Yes, sir.

Q. Now, Mrs. Wilson, this is the only agreement that you know of being made between Mr. Dwyer and Mr. Wilson, is it not?

A. Yes, sir.

The witness also testifies (page 446):

"Q. And the substance of that agreement was, according to your best recollection of it and according to your best understanding of it, was that Mr. Dwyer was to locate Mr. Wilson on a timber claim, and Mr. Wilson was to pay him a location fee, and Mr. Dwyer was to help him to get the money, or borrow the money for him to pay for the land and pay expenses.

A. Yes, sir.

FRANCES A. JUSTICE.

Frances A. Justice was subsequently married to a Mr. Clausen, and she appeared as a witness as Frances A. Clausen.

On page 847 the witness testifies in relation to her taking up a timber claim, that she first asked Mr. Dwyer to get her a claim several times. She talked to him about a claim, and asked him to get her one; that she first intended to get a claim in California, but on account of some trouble in that section she did not go there.

"Q. Yes, but now what was your arrangement with Mr. Dwyer before he located you?

A. No arrangement, only that he would locate me on a claim.

Q. And you was to pay the expenses?

A. Well, I was to pay the expenses. I borrowed the money to pay them.

Q. Well, I am speaking about your arrangements with Mr. Dwyer, you know. Who was to pay your expenses?

A. Well I was to pay the expenses after I borrowed the money to pay them.

Q. Now, explain how that was?

A. Well, Iasked him to borrow the money for me to get a claim. First, I tried to get money in Wisconsin to get a claim; then I tried to get the money of Mr. Crocker, a relative of Mr. Justice, and they only had money enough to get their own claim; and I had my place mortgaged so that I couldn't very well borrow money myself; and I asked Mr. Dwyer as a favor if he would borrow money for me to get a claim, and he said he didn't know whether he could get it or not; he would try.

Q. Now what were you to get then for your claim?

A. Well, he didn't know what we would get out of it. We figured on it, and he didn't know whether he could sell the claim or not right away. He didn't know just what he would get out of it.

Q. Didn't he tell you before you went up there that he would give you $150 for your right?

A. No, sir.

Q. Mrs. Justice, you remember testifying——

A. I rember Mr. O'Fallon coming to the house and I tried to tell him how it was, and he says, 'Mrs. Justice, you are evading the truth,' every time I would try to tell him how it was.

Q. Now, one moment; you made an affidavit for Mr. O'Fallon, didn't you?

A. Well, he scared me pretty near dead, I was pretty near crazy at the time—I was sick, and he said: 'We know just how that was, and you will have to tell me just how it was,' and I tried to tell him how it was, and he wouldn't allow me to tell it that way.

Q. You signed the affidavit and swore to it, didn't you?

A. I signed the paper there, but I was just about wild, I didn't know what I did sign."

On page 858 the witness testifies:

"Q. Now, do you remember whether or not you had an arrangement with Mr. Dwyer by which you were to take up your claim and he was to furnish all the expense money, and the money for final proof, and that you were to get $150 out of it, after all expenses had been taken out?

A. He thought there would be about $200 when he could sell the claim. The way we figured about that, the way that other claims was selling."

Here we desire to call the Court's attention to the proceedings appearing on pages 859 to 860 as evidence of the witness's condition. The witness heretofore testified that she was in ill health at the time O'Fallon and another special agent called upon her, looked through the house to see that she was alone, then locked the door, began to threaten and coerce her, and when she did attempt to tell them the truth, they would invariably accuse her of evading the truth, telling her they did not want to cause her any trouble, that the Government had sent them, and she must tell it in a different way, and by this means compelled her to sign an affidavit which was false. She was in ill health at that time, had just buried her son who was killed by an accident, and just a short time prior thereto had suffered the loss of her husband by death. That she was in the same weak and ill condition at the time she testified at Moscow, when she was threatened and coerced by Ruick, Goodwin and O'Fallon. As evidence of her condition then, and her condition now, the proceedings on page 861 clearly indicate:

> "Q. Well, now, I will show you the record, and ask you to read from the question at the top of page 383. 'Now state what that understanding was"; then at the bottom of the page where the answer is——

NOTE BY REPORTER: Witness fell forward from the witness stand, apparently in a fainting condition, and was assisted by her husband and a lady friend. Informal recess was thereupon taken. At 11:05 o'clock the hearing was resumed."

On page 861 the reporter's note is as follows:

"The witness, Frances A. Justice, was thereupon excused from further testifying at this time."

On page 1366 of the record the witness testified:

"Q. I have just read these questions, and I shall read them again, and ask you if you remember them. I read from page 382 of the record of case 1605, and ask you whether or not you remember these questions being read to you at the time I refer to, and whether or not you made the replies which I shall also read."

Here follows a quotation from the record of the evidence of the witness in the former trial, and on page 1370 of the record, the witness testifies:

"Q. Well, are they the facts as you understand them?

A. I was to give a contract to secure that money. I gave a contract to secure the money until I should sell the claim.

Q. Do you remember when you gave that contract? Did you give it when you first spoke to him about it?

A. No, sir.

Q. It was after you made the proof?

A. Yes, sir."

On page 1371 the witness testifies:

"A. The understanding was from the way we figured that it should bring $150 or $200 at the way claims were selling above expenses; there was no terms that there should be that much, but we thought they would bring that much."

On pages 1373 to 1383 of the record the witness was asked concerning her sworn statement and evidence given at the former trial, or the trial of the criminal cases at Moscow.

On pages 1378-1379 the witness testifies:

"A. There was no agreement that I would sell the claim."

On page 1384 the witness testifies:

"A. I remember there was a good many questions asked me, and I remember, too, that Mr. Ruick told me that I would be indicted if I didnt' answer questions about the way those fellows made me make the statement. They wouldn't allow me to make the statement the way I wanted to make it. They said, 'You are evading the truth now, Mrs. Justice: that isn't right,' and they had me so worked up that I don't remember how I did answer questions."

On cross-examination, at page 1411, the witness testifies as follows:

"Q. Mrs. Clausen, will you state in what way you was treated when Mr. Goodwin and Mr. O'Fallon had you sign this affidavit; what they did, and what they said to you, as well as you can remember?

A. They came there to the house and wanted to know if I was alone, and they said they were sent there by the Government to get a deposition

from me, and they went and looked into every room in the house to see whether there was anyone in the house that could hear it, and they asked me questions, and whenever I would try to tell how it was, Mr. O'Fallon said: 'Look out, Mrs. Justice, you are evading the truth; we know just how that was, and you are not telling it as it was.'

Q. Did he tell you how it was?

A. Yes; he would tell how it was, and would say, 'That is the way it is.' And the next question he would ask, it was the same way: 'Now, look out; you are evading the truth. We have found out all about this; we know there was a prior agreement, and you was to get $150,' and all that sort of bosh, and wouldn't let me tell how it was."

We also call the Court's attention to the evidence of the witness appearing at pages 1416 to 1419 of the record.

EDNA P. KESTER.

Edna P. Kester was the original entrywoman; is the wife of George H. Kester; purchased the land with money given her by her husband; is the owner of the same; has never conveyed it, and never made any contract or agreement with any person for its conveyance. There was no fraud or irregularity in the acquiring of title to this tract of land.

The evidence of Edna P. Kester appears at pages 736 to 744. Upon cross-examination, at pages 743-

744, the witness testifies that the affidavit made at the time of filing her sworn statement was true; that she has no contract or agreement with any person for a conveyance of the same.

ELIZABETH KETTENBACH.

The evidence in relation to this entry is very clear and complete. She is the original entrywoman, and has never made any contract or agreement with any person for the conveyance of the land.

The evidence of the entrywoman appears at pages 1557 to 1592 of the record.

WILLIAM J. WHITE and MAMIE P. WHITE.

The entries of William J. White and Mamie P. White were made in good faith. They were entitled to acquire land such as they did in this case. After they made their final proof, paid the purchase price, they held the land for several years, and finally sold the land to Elizabeth White, mother of William J. White.

The evidence of William J. White in relation to the acquiring of title to these two tracts of land appears at page 490 to 512 of the record.

MARTHA E. HALLETT.

The evidence of Martha E. Hallett appears at pages 1592 to 1609 of the record.

On page 1593 the witness testifies in relation to her acquiring title to the land, and that she never talked with Mr. Kester concerning the acquiring of title to a timber claim. On page 1595 the witness testifies that she first spoke to a gentleman who was rooming at her place about taking up a timber claim; that she, with Mr. and Mrs. Kester and Mr. and Mrs. White and Elizabeth White went to view the land. That she paid William Dwyer $100 for locating her.

On pages 1600-1601 the witness testifies to the manner of her procuring the money with which to pay the purchase price, and on page 1608, on cross-examination, testifies that Mr. Kester collected a note for her of some $16,000 or $17,000, as well as other collections; that she handled considerable sums of money, and most of it was handled through Mr. Kester, who acted for her.

The evidence shows that this entry was made in good faith; that the entrywoman still retains her land, and has made no contract or agreement to convey the same.

DANIEL W. GREENBURG.

The evidence of Daniel W. Greenburg appears at pages 700 to 716 of the transcript.

At page 702 the witness details the manner in which he went to the land, first being located by Mr. Dwyer, and on page 703 testifies that there were no arrangements made at all; that Mr. Dwyer simply said that he could locate the witness on a good claim, one that would satisfy the witness and would be all right.

On page 715 of the transcript the witness testifies, on cross-examination, that there was no contract or agreement between himself, Mr. Kester, Mr. Kettenbach or Mr. Dwyer, or either of them, for the sale of the land, prior to the time he made final proof; that the affidavit he made at the time he filed his sworn statement was true.

DAVID S. BINGHAM.

The evidence of David S. Bingham in relation to this entry appears at pages 1139 to 1171 of the transcript, the cross-examination appears at page 1156, and his re-cross-examination at page 1168.

The witness testifies to his taking up the claim; to his making final proof; and on page 1141 the witness

details a conversation which he claims to have had with Jackson O'Keefe, which evidence was admitted over the objection of the defendants, as follows:

> "WITNESS: He wanted to know the reason why I didn't take up a timber claim myself. That he would be up in that country. He says, 'You have been mining up there,' and he says, 'You have used your money up there,' he says, 'and I don't see why you don't get some of it back.' 'Well,' I says, 'I have been thinking about that, Jack,' I called him Jack for short—I says, 'I think possibly I may.' 'Well,' he says, 'you had better go down and file,' which I did, and I filed."

At pages 1142-1143 the witness testifies:

> "Q. Now, was there anything said between you and Mr. O'Keefe or any of the other defendants relative to what you would do with the land after you took it up?
>
> A. No, sir: only with O'Keefe.
>
> Q. And what was that?
>
> A. As far as Kettenbach and Kester and Mr. Dwyer is concerned I never talked land to them one way or the other. What business I done, I done with O'Keefe.
>
> Q. Now, what was your understanding with O'Keefe?
>
> A. My understanding was I had to take this claim up, and he was to have the prior right of buying after I proved up."

The witness also testified that there was nothing said as to the price, and testifies concerning his understanding of the relations existing between Kester, Kettenbach and O'Keefe; which was objected to

by the defendants, and which objections the defendants are entitled to have sustained, and the evidence excluded.

On page 1144 the witness testifies as to some statement which he claims O'Keefe made to him, that he was in some way connected with Kester and Kettenbach, and that he would like to have a prior right to buy the witness' claim if he felt disposed to sell it. The evidence falls far short of an agreement to sell the land prior to the time he filed his sworn statement. It is clear that the witness had no agreement or understanding with O'Keefe that he would sell the land prior to the time he made his final proof, and he was under no obligation to sell it.

On pages 1153 to 1155 the witness details the circumstances of his selling the land, and states that O'Keefe came up to where he was living at Cloverland, and asked the witness if he wanted to sell, and the witness testifies:

> "WITNESS: And there was a ten-acre tract up there—orchard tract—that I wanted to get hold of, and I had quite a bit of money coming to me, and as I thought I could get the money out of this timber claim I could buy this ten acres; and I had a talk with my wife and she thought we had better sell and take this ten acres, so I told him I would sell to him, and he says, 'Well, now,' he says, 'the arrangement is,' he says, 'to let you have over and above expenses,' he says,

'that you was to go down there, why,' he says, '$150.' 'Well,' I says, 'I might as well take it, Jack, along with the balance of them,' He told me he had made similar arrangements as far as the Taylor boys, I guess."

On page 1154 the witness also states that Mr. O'Keefe gave him a check for $150. The witness' evidence that they arrived at the agreement as to price, and the terms of sale at that time, is complete.

Cross-examination. On page 1156 of the evidence the witness testifies, on cross-examination, and identifies an affidavit which he made before George H. Rummons, a notary public, and the witness read the document. The affidavit was very clear, and while the witness does not remember some of the statements made in the affidavit, yet the matters contained in the affidavit were substantially correct.

We call the Court's attention to the statement made in the affidavit, appearing at page 1159 of the record, in which the witness says:

> "After I had filed, I had a conversation with O'Keefe in which I asked him (O'Keefe) if he was investing in timber up there. He said, yes; he was intending to buy a little. I asked him what he was paying for a quarter section, and he said: 'I can't talk about buying until after you prove up.'"

At the bottom of page 1160 the witness admits that the affidavit is substantially correct, and the affi-

davit is in conflict with any theory, suggestion, or inference that there was an agreement to purchase the land prior to the time the witness filed his sworn statement or made his final proof. The affidavit referred to is Defendants' Exhibit "H", appearing at pages 4139 to 4142 of the record.

WILLIAM McMILLAN.

At pages 532 to 551 of the record appears the evidence of William McMillan, and at page 535 the witness testifies:

> "WITNESS: I told him I didn't have money enough to take one without mortgaging my place, and I told him I wouldn't do that. And so he said if I took a notion to take one, if I needed a little money, he would help me out; which he did. I had part of the money, but didn't have enough."

There is nothing in the witness' evidence that would indicate that the witness had a prior agreement for the sale of the land, but all of the facts and circumstances show clearly that there was no such agreement.

On cross-examination the witness testifies, at page 549 of the record, that he held his land for nearly two years after he made his final proof; that he used about $100 of his own money, and borrowed the

balance of the money from Mr. Kester. That the affidavit he made at the time he filed his sworn statement—that he had made no other application; that he had not applied to purchase the land upon speculation, but for his own exclusive use and benefit—was true.

It is very clear that there was no fraud or irregularity in the acquisition of this tract of land.

HATTIE ROWLAND.

There is nothing in the record which would indicate that there was any fraud or irregularity in connection with the acquiring of title to this tract of land. The entrywoman was not called in support of the charges in the bill.

WILLIAM HELKENBERG.

This witness did not appear and testify, and there is no evidence that there was any fraud or irregularity in connection with the entry of this witness; and the bill should be dismissed as to this entry.

WILLIAM HAEVERNICK and ALMA HAEVERNICK.

This entryman and entrywoman appeared and testified, the evidence of William Haevernick appearing at pages 470 to 485, and that of Alma Haevernick at pages 485 to 496 of the record.

There is nothing in the evidence of the witnesses, or appearing of record, to show that there was any fraud or irregularity in connection with the acquiring of title to these two tracts of land. They have long since been transferred to the Clearwater Timber Company, which is an innocent purchaser, in good faith, and without notice of any irregularity, if any such did exist. These two entries should never have been included in the bill.

GEARY VAN ARTSDALEN.

The same condition exists in relation to this entryman, and the land has long since been transferred to the Clearwater Timber Company, which is an innocent purchaser, for value, without notice of any fraud or irregularity in the acquisition of title to the land.

ROBERT O. WALDMAN.

The evidence of Robert O. Waldman shows that there might have been an understanding between the witness and Clarence W. Robnett. His evidence appears at page 3725, direct examination, cross-examination 3736, re-direct examination 3746, re-cross-examination 3746.

The evidence shows that long after final proof was made the land was transferred to the Lewiston National Bank, for value, and in good faith. We submit, however, that even the evidence of the witness Waldman himself falls far short of a prior agreement, even with Robnett. The evidence of the entryman, Robert O. Waldman, shows that Robnett gave him the privilege of paying him a location fee of $100, or accepting $400 for his right, and he deed the claim over to Robnett; and the witness testifies:

> "A. I told him I would much prefer to take it up on my own hook, and furnish the money myself, as I felt able to do so at that time, and it was agreed that he was to look around for a claim for me. Then, in the course of a week, matters turned up that made it impossible for me to use my own money, and I told him so; and the witness testifies that he then told Robnett he would accept the latter's proposition."

The cross-examination appears at pages 3736 to 3740:

"A. He said I should try to get the money myself and pay him a location fee, and sell to whoever I could, and if I couldn't do that, he would probably—he would try to raise the money for me."

The lower court has found that there was fraud in relation to the acquisition of title to this tract of land, but that the defendants were in no way or manner connected with the same, and as Robnett was an employe of the Lewiston National Bank, and the land was transferred to the Lewiston National Bank, the bank had such notice as warranted the cancellation of the entry.

ROWLAND A. LAMBDIN.

The evidence of this witness appears at pages 2153 to 2158 of the record.

The witness refused to testify for the reason that his evidence would be in conflict with the evidence he had given in the criminal case, which evidence was read into the record over the defendants' objection, and which should be stricken therefrom. It is very clear that the evidence given at the criminal trial was false, and as there is no competent evidence in the record affecting the validity of this entry, the entry should remain intact. Then, the evidence shows that the land has been transferred to the

Western Land Company, for value, which paid the purchase price, and which had no notice or knowledge of any irregularity in connection with the transaction.

IVAN R. CORNELL.

The evidence of Ivan R. Cornell appears at pages 2800 to 2860 of the record. He testifies to a prior agreement with George H. Kester. As to whether or not there was such an agreement depends upon the evidence of the witness Ivan R. Cornell being weighed against the evidence of Geo. H. Kester and William Dwyer, and all the facts and circumstances in the case. The reputation of the two defendants is quite as good as that of Ivan R. Cornell, who admits that he swore on various occasions that there was no prior agreement, and after his indictment, and his conversation with N. M. Ruick, former U. S. Attorney, and his own attorney, he decided to testify that he had a prior agreement. The witness shows a high degree of perjudice against the defendants and at the close of his cross-examination testified, at page 2860 of the record, that, if there was anything he could do to cause the defendants to lose their lands,

he certainly would do it, and, on page 2860, testifies as follows:

> "Q. You are not on friendly terms with the defendants, are you?
>
> A. I should say not; no. I guess you wouldn't be either, after the insulting questions that were asked.
>
> Q. You haven't been on friendly terms with them, have you?
>
> A. No; I don't want to be, either.
>
> Q. If there was anything you could say that would help them to lose their land, you would be willing to say it, wouldn't you?
>
> A. I certainly would, yes."

The land has been long since transferred to the Potlatch Lumber Company, which paid full value for the same, and without notice of irregularity in connection with acquiring title to the same.

As weighed against the evidence of Ivan R. Cornell, the Court should also take into consideration the evidence of Ab. Masters, Chief of Police of the City of Lewiston, found at pages 3076 to 3078 of the record, and that of William Schuldt, who is at present United States Deputy Marshal for the District of Idaho, his evidence appearing at pages 3067 to 3075 of the record. The witness Cornell is in conflict with these two disinterested and reputable witnesses, as well as in conflict with the evidence of George H. Kester and William Dwyer.

FRED W. SHAEFFER.

The evidence of the witness Fred W. Shaeffer appears at pages 448 to 469 of the record. The cross-examination appears at pages 464 to 469. The evidence of this witness falls far short of showing a prior agreement. Then, even if a prior agreement was proven, it would not affect the title to this land, for the reason that it has long since been transferred to the Potlatch Lumber Company, which is an innocent purchaser, for value, and without notice of any irregularity in connection with the claim.

We have not taken up the evidence of the defendants in relation to these particular entries for the reason that we do not desire to extend this brief to any greater length, but will ask the Court to carefully examine the evidence of the defendants, and of their witnesses, in passing upon the same, as applied to the various entries.

REPLY TO APPELLANT'S BRIEF.

On page 4 of appellant's brief we find a reference to the evidence of Clarence W. Robnett and Harvey J. Steffey, and a complaint that the lower court arrived at the conclusion that these two witnesses were not worthy of belief; and also a complaint that the

court gave weight and credibility to the testimony of Kettenbach, Kester, Dwyer and other witnesses, as though it came from disinterested persons.

We can hardly understand how a court could consider the evidence of the various witnesses, and arrive at the conclusion that the witnesses Clarence W. Robnett and Harvey J. Steffey were or are worthy of belief. Robnett and Steffey each admit the commission of perjury and subornation of perjury upon various occasions. They admit that they knew they were committing perjury and suborning the commission of perjury, and neither thereof seems to feel the least remorseful on account of the same.

The references to Kester, Kettenbach and Dwyer are in the nature of opinions of counsel for appelant, and in no place is such opinion supported by evidence which is strong, convincing or conclusive. The defendants are not only supported by evidence of witnesses who are worthy of belief, and who are disinterested, but in almost every case are supported by the evidence of the entrymen themselves and by other persons whom the appellant called as witnesses in an effort to sustain the charges in the bill.

The witness Steffey is not only impeached by the evidence of Kettenbach, Kester and Dwyer, but also by the evidence of the entrymen and entrywomen,

and by the facts and circumstances surrounding the transactions; and we here call attention to the discussion of the evidence of the various witnesses comprising the Steffey Group, elsewhere in this brief, and wherein we have referred to and considered the evidence of Steffey himself.

For instance, the witness Steffey testified that Kester, Kettenbach and Dwyer paid the entrymen and the entrywomen a specified amount for the taking up of the land and the transferring of the same to the defendants, and upon cross-examination it developed that neither Kester, Kettenbach nor Dwyer knew the entrymen and entrywomen had been located upon the claims, or had made their final proof until some time thereafter, and until Steffey applied to the defendants to sell the land to them (Evidence of Steffey, pages 1825-1826 of the record).

It also appears that a different consideration was paid to each of the entrymen and entrywomen according to the value of the land; that Steffey drew checks upon his own bank account for the money, and, when a settlement was made, the money was paid to Steffey and he received credit in his account for the entire sum paid as a consideration for the transfer of the land. None of the entrymen or entry-

women came in contact with the defendants until their land was sold and the deeds executed.

Then, it seems that Steffey did not go to the officers in charge of the prosecution and place before them the matter of his wrong-doing in relation to the purchase of this land for the purpose of vindicating the laws of the United States, or on account of any remorse he felt by reason of his various acts, but because he desired to avenge some real or imaginary wrong which he imagined he had suffered; and we call the Court's attention to the cross-examination of Steffey upon pages 1851-1852 of the record:

> "Q. Now, when did you first wake up to the realization of the fact that there was something wrong about this transaction?
>
> A. Before I entered into it.
>
> Q. When did you make up your mind to tell the Government officials about it?
>
> A. Well, some time after Dwyer had tried to sell my barn, and did other things in connection with it.
>
> Q. As a matter of fact, you did it more to even up with Dwyer than anything else, didn't you?
>
> A. No, I was perfectly even with him before.
>
> Q. You was even with him before? Then did you do it to even up with Kester and Kettenbach?
>
> A. I had nothing to even up with them.
>
> Q. But if you hadn't been mad at Dwyer you wouldn't have done it, would you?
>
> A. Possibly I might.

Q. It wasn't for the purpose of vindicating the laws of the great commonwealth that you did it, then, was it?

A. Not exactly, no, sir.

Q. It wasn't because you had repented of anything wrong that you had done or a kind of remorse, or anything of that kind?

A. Oh, not in particular, no, sir.

Q. But it was simply to even up with Dwyer?

A. No; I considered myself even with him.

Q. You considered yourself even, but you wanted to go him one better?

A. No, not in particular."

We are unable to set forth here the entire evidence of Harvey J. Steffey, but inasmuch as the trial court observed the evidence of Harvey J. Steffey when he testified against the defendants in the criminal case, and upon various other occasions, and in view of the admissions the witness was compelled to make, we can hardly understand how the court could view the evidence of Steffey as coming from an undefiled source, and as that class of evidence worthy of respect, or how the court could give any weight to the evidence of this witness at all.

CLARENCE W. ROBNETT

We have heretofore referred to and discussed the evidence of Clarence W. Robnett, and we will not enter upon an extended discussion of the same here,

but in view of the fact that Robnett had embezzled $137,000 from the Lewiston National Bank, was under various criminal charges, and a long term in the penitentiary was staring him in the face; that he had committed perjury on various occasions; that he knew that he was committing perjury, and, as late as July, 1909, made a false affidavit in relation to the Carrie D. Maris claim which he knew was false at the time he made it; that he was testifying for the prosecution with the hope of gaining some consideration by reason of his so testifying; and the fact that he was immediately pardoned after being sentenced by the trial court to a term of ten years in the Federal penitentiary, and released from the serving of any time whatever for such offenses by pardon from the President, (page 265 of the record), and the inconsistency of his testimony in this case, and the fact that he is impeached by almost every entryman and entrywomen who testified, not only in behalf of the appellant but in behalf of the defendants as well, we can hardly understand how any court could lend any weight to the evidence of this witness. Does this evidence come from an undefiled source? What court can say that it does? The offenses committed by Robnett involved moral turpitude. Counsel refers in general terms to the fact

that the evidence of Robnett is corroborated. We cannot find a single instance where the evidence of Robnett is corroborated. He was called as a witness for the prosecution for the purpose of proving the fraud in relation to the several entries. The entrymen were called in an effort to corroborate the evidence of Robnett, and in each and every instance the entryman not only contradicted but impeached Robnett.

The evidence of Robnett shows that he was skillfully schooled and trained for this especial occasion. He testified upon numerous other occasions. He was cross-examined upon numerous other occasions. His evidence was transcribed. The special agents in charge of the appellant's case had the advantage of his evidence, his cross-examinations, and the mistakes he had made theretofore. They had posted him and groomed him for this particular purpose, and there was an effort to make Robnett the very best witness on this occasion that he had been upon any other. They had more time. The Court was not present to sustain objections which should have been sustained. Robnett was in a position where he could refuse to testify when he was upon dangerous ground. He did refuse to testify, and was not freely

and fully cross-examined, and could not be, on that account.

See Evidence Robnett pp. 2353, 4, 5, 6, 7, 9, 2361 2, 3, 4, 5, 6, 7, 8, 9, 2370, 2374, 2364, 2396, 2647 record.

On page 6 of appellant's brief counsel refers to the evidence of the defendant Dwyer, and wherein the defendant Dwyer was convicted upon the charge of suborning Hiram F. Lewis, Guy L. Wilson and Charles Carey, (Dwyer vs. United States, 170 Fed. 160, Case No. 1606).

We hardly see why counsel should inject that case into the case here, or his reason for so doing, save and except as an effort to prejudice this Court against the defendants, especially so as the case was reversed and the Government did not have confidence enough in the case to retry the same, and dismissed it of its own motion. Dwyer was always ready and willing to meet the charge under the rule laid down by the Court in its opinion, and the rule announced by the Supreme Court of the United States, and felt confident of his acquittal; that he had committeed no offense in relation to the entry of either of the witnesses, and we call the Court's attention to the evidence of Hiram F. Lewis, at pages 901 to 977 of the record. It appears that Mr. Lewis, when he testified against the defendant William

Dwyer, was threatened and coerced into testifying falsely, but he subsequently repudiated that evidence; repudiated it when he was upon the stand in this case, and stated why he was induced to so testify in the case wherein Dwyer was convicted. He testified positively in the case under consideration here that he had made no agreement prior to filing his sworn statement or prior to the time he made his final proof; that there was no understanding between the witness and either of the defendants for the sale of his land prior to the time he made his final proof.

On page 903 of the record, the witness testifies:

Q. Did Mr. Dwyer solicit you to take up a claim?

A. No, sir."

Q. Well what did Mr. Robnett say to you?

A. Well, at that time Robnett and Nickerson were in the timber business up on the Lolo, and they wanted me to go up there and take a claim. I went up and looked at the timber and didn't like it and didn't take any. Afterwards I came back and met Mr. Dwyer one day and asked him if he had any timber.

Q. Did you ask Mr. Dwyer or did Mr. Dwyer ask you?

A. I asked Mr. Dwyer.

Q. You have testified at several trials before, haven't you, Mr. Lewis?

A. Yes, sir.

Q. And you had your faculties with you when you were testifying, did you not?

A. I guess part of them.

Q. The same as you have now?

A. Well, I don't know. The first time I testified, when Mr. Ruick was up there, why they had me in the sweat-box up there, and Mr. Ruick threatened impeachment if I didn't come out and tell things just to suit him; and there were certain things that I told Mr. Ruick and Mr. Johnson and whenever I said anything if it didn't suit them they would cut it out. * * * * *

And on page 905, the witness testifies:

Q. Now, what did Mr. Dwyer say to you in this conversation which you had?

A. Well, I couldn't tell you just what he did say just now.

Q. Well, tell us as near as you can remember.

A. I think I asked him about the claims, and he told me that they had some good claims up there, and if I wanted to take one I could make a little money out of it.

Q. Is that the way he expressed it?

A. I think so.

Q. Did he tell you what he would give you for your right for your claim?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

* * * *

On page 914 the witness testifies; wherein counsel for appellant asked the witness if he did not testify in the former trial that Dwyer agreed to give him $150.00 for his right, to which the witness replied:

A. I don't see how that could be, that $150.00 there, because I never agreed to take that price.

Q. Now, I will ask you if you remember those questions being asked you, and those answers being made by you?

A. I never answered to the $150.00 proposition; I know that. If I did I didn't intend to at the time.

The SPECIAL EXAMINER: Counsel asked you if you remember about the questions being asked you, and the answers. That is the first thing; and then, of course, you might explain whether they are true or not.

WITNESS—Well, yes, sir.

MR. GORDON: Q. You say you think those questions were asked and those answers given?

A. Yes, sir.

Q. Now, were they true, and are they true—those answers?

A. No, they are not true, not all of them.

* * * *

On page 968 the witness testifies, on cross-examination:

Q. Mr. Lewis, you said that you tried to sell your land to someone else. Can you remember who you tried to sell it to?

A. I tried to sell it to Mr. Williams, for one, and Joe Molloy, and I think afterwards Mr. Brown. There was two or three parties I know that I tried to sell it to.

Q. That was after you bought your brother's claim?

A. Yes, sir.

Q. What success did you have in trying to sell to them?

A. I couldn't get rid of it; I couldn't dispose of it. They all said it was second growth timber and didn't want it.

Q. How did you come to go to Kester and sell it to him?

A. I went to him just the same as I had been going to these others afterwards, and asked him if he wouldn't buy those claims, that I had tried to sell them to others and couldn't do it, and he finally said if I couldn't sell them he would try and see what he could do to take them off my hands.

Q. Did he tell you to go and see some one else and try to sell them?

A. Yes, sir; he told me to see someone else and to sell them if I could.

Q. And you went and tried to sell them to somebody else after that?

A. Yes, sir.

Q. Wasn't the reson your brother didn't get as much as you did, because he had a short claim, only three forties?

A. Yes, sir.

Q. That is the reason you didn't get as much for his claim as yours?

A. Yes, sir.

Q. You say that when you would tell Mr. Ruick and Mr. Johnson something that it was a fact that they would say, "Cut that out; we don't want that?"

A. Yes, sir.

Q. Because that was something that was favorable to the defendants?

A. Yes, sir; I think that was their reason for doing that.

Q. Can you remember any particular thing they told you to cut out?

A. When I spoke about selling these claims to others, they ordered that cut out.

* * * *

A. Well, in regard to borrowing the money, too.

Q. What was that?

A. He asked me or tried to make me state that I had borrowed all of it, all of this money from the bank, didn't have any of my own at the time, and I told him I did have money there at the time, borrowed it and gave my notes at the bank. (Pages 969-970 of the record).

Q. Can you think of anything else?

A. Well, in regard to intimidating me. He threatened to impeach me and indict me, and everything else pretty near, if I wouldn't come out and tell it just to suit them.

Q. I will ask you if you told them anything about paying taxes on the land, and that they told you to cut it out?

A. Yes, sir; I told him I had paid taxes for two years, and had the tax receipts at home,—I had them with me at the same time,—and they said they didn't want me to say anything of that kind, wouldn't allow it; and I have those tax receipts up home now.

Q. You did pay taxes on the land, did you?

A. Why, I paid it for two years. (Page 970 of the record).

On page 971 the witness testifies that the affidavit he made at the time he filed his sworn statement and the time he made his final proof was true.

After an examination of this witness' evidence it is hard to understand why counsel for the appellant would contend that the defendant Dwyer should have been indicted, tried or convicted upon the charge of subornation of perjury. The evidence of

the wtiness is in conflict with any such contention or theory. This witness was called as a witness for the appellant, and in an effort to sustain the charges in the bill. His evidence was admitted over the defendants' objections, and counsel for appellant should not have been permitted to cross-examine the witness concerning his former testimony, and make an effort to induce the witness to testify to something which was not true.

The reference which counsel makes to the evidence of William Dwyer, to his conviction upon the charge of subornation of perjury is unwarranted, is unsupported by the evidence, and should not have been made. Then, the entry of the witness Hiram F. Lewis is not involved in this action, and no effort is being made to have the patent to this tract of land cancelled.

Counsel for the appellant on pages 6 and 7 of his brief refers to the charge of subornation of perjury against the defendant William Dwyer, wherein the defendant William Dwyer was charged with suborning Charles Carey, and we desire briefly to call the Court's attention to the evidence of Charles Carey, appearing at pages 551 to 581 of the record.

On pages 557-558 the witness Charles Carey testifies:

Q. Did you suggest the final proof witnesses, or did Mr. Dwyer sugegst them?

A. A few days before we proved up I asked him what there was about it, something like that, and in a few days I told him my time was up on the notice—the 18th, rather—called his attention to it, and at that time he asked me if I would have the money.

Q. Is that the first time he had said anything to you about the money?

A. That is the first time.

Q. Well, when you started this entry, did I understand that you didn't have even the money to file your original papers in the land office?

A. Oh, I had the money.

Q. Sir?

A. I had money enough to do that.

Q. Well, why was it you got it from Mr. Dwyer, then?

A. Well, I had understood from Mr. Scotty that he would furnish me the money.

Q. Furnish you all the money you needed?

A. Yes, sir.

Q. And did you have to ask Dwyer for it, or did he hand it to you?

A. No; he just handed it to me.

Q. You didn't tell Dwyer that you didn't have the money?

A. No; there was no questions asked.

Q. And then I understand you to say you went to Mr. Dwyer when it came time to make the proof, and suggested that you needed the money?

A. A few days before I said it would soon be time to prove up, and he said, "When is it, Charlie?" and I says, "It is the 18th," and he says, "Have you got money enough?" and I told him no.

Q. And what did he say then?

A. I don't remember the words he might have said. I know I got money from him.

Q. Now, did you get the money the day you made the proof, or how long before ?

A. It was the day before, I think.

And on page 561 the witness testifies:

Q. * * * Do you remember whether or not before you signed and swore to that paper that you discussed the propriety of taking that oath, with Mr. Dwyer?

A. I couldn't say whether it was the first paper or the second one. This is the—excuse me.

Q. I am sepaking of the first paper now.

Q. Yes.

A. I can't remember on that first paper, whether it was the first or second one. We discussed that question, but whether it was on the first or second one I don't know.

Q. What did Mr. Dwyer say about that?

A. He says, "You are taking it up for your own benefit."

Q. Did he explain why you were taking it up for your own benefit?

A. Yes, he said, "If you can sell it you will get something for yourself."

Q. Did he argue it with you?

* * * *

A. Yes, we argued it back and forwards and talked it over.

On page 566 the witness testified that Mr. Dwyer charged him $150.00 for a location fee.

On page 575 the witness, on cross-examination, testifies to his being threatened by special agents,

and who it was threatened him; and on page 576 the witness testifies as follows:

> Q. Now, Mr. Carey, in response to a question from Mr. Gordon, I understood you to say that you did not consider that you had any contract to sell your land to anyone, before you made final proof, and that your statement in that regard is true. That is right, is it?
>
> A. Yes, sir, I never considered that I had an agreement.
>
> Q. Then in your sworn statement, where you swore that, "I have made no other application under said acts." That is true, is it? You had made no other application?
>
> A. No.

The witness also testifies that the affidavit he made at the time he filed his sworn statement,—that he had made no contract or agreement to sell the land to anyone else,—was true.

The evidence of this witness is not in conflict with the evidence of Mr. Dwyer in any material part, and shows conclusively that the charge made by counsel for appellant,—that Mr. Dwyer had suborned Charles Carey,—is unsupported by the evidence.

On page 577 the witness testifies:

> Q. Now, do you not remember, Mr. Carey, that the instrument you signed when you made your final proof and gave to Mr. Dwyer was an option which gave him the right to sell the land for you if he could find a buyer?
>
> A. I don't know what the paper was.
>
> Q. It might have been that kind of a paper?

A. It might have been an option for all I know.

Q. And that he told you if you could sell it for any more money to go ahead and sell it?

A. He said to come and let him know.

Q. And you wasn't able to sell it for any more money?

A. No.

Q. And you finally told Mr. Dwyer that you wanted to make a settelement and settle up?

A. Yes, that I was going to leave.

Q. And that is when you and Mr. Dwyer got together and settled up, and you gave him this deed?

A. He asked me when I wanted to leave town, and I told him, and he says, "Come around to morrow or next day and I will see what I can do for you or let you know," or something to that effect.

Q. And you practically had control of your land up until that time?

A. From what he told me I supposed I did.

Q. And after you gave him this deed you considered that you had no more interest in the land after that?

A. No, I considered it sold then.

On page 577 of the record it appears that the witness made his final proof November 18, 1904, and the deed was dated April 15, 1905, so the deed was executed and the land finally sold to the defendants something like six months subsequent to the time the final proof was made.

On page 7 of his brief counsel refers to the fact that in the case of Robnett vs. United States, 169

Fed. 778, Robnett did not take the witness stand in his own behalf. We hardly see why it is that counsel should go outside of the record and comment upon this matter. Whether or not Robnett took the witness stand in his own behalf is immaterial. It seems that this Court finally decided that Robnett had committed no offense; that his case was ordered dismissed. If he was advised by counsel that in their opinion he should not take the witness stand, or if he elected to take that course of his own volition, is immaterial, and it seems to us that the comment made by counsel on pages 7 and 8 of his brief is highly improper, and especially so inasmuch as it is necessary for him to depart from the record in order to call the Court's attention to this particular feature of the case.

We have heretoofre called the Court's attention to the entry made by Carrie D. Maris, referred to on page 8 of appellant's brief, and we will not enlarge upon what we have heretofore said, but we desire to call the Court's attention to this particular entry, appearing elsewhere in our brief, and invite the Court's careful consideration of the same.

On page 10 counsel refers to the comment of the Court in the matter of the pardon of the witness Robnett, and quotes at length from the Court's

opinion in regard thereto, and on page 11 of his brief counsel again departs from the record in order to apprise the Court of the dismissal of the indictments, not only against Robnett, but against the various witnesses who had been indicted by the Government in the hope of intimidating them and to compel them to swear falsely in regard to the acquisition of their timber claims. We are justified in this comment, since in many instances, especially in the case of Joel H. eBnton, Charles Carey, Rowland A. Lambdin, Hiram F. Lewis, Francis A. Justice, Prentice the two Taylor boys, and others. The record shows that most of them they were intimidated, and those who were not indicted were threatened with indictment if they did not testify satisfactorily to the officers in charge of the prosecution. We consider the comment of counsel, and his departing from the record, highly improper, but an examination of the several indictments, appearing upon pages 11, 12 and 13, will corroborate the evidence of the various witnesses, and the manner in which they were treated at the hands of the prosecution. An indictment dismissed without trial, prima facie was brought without probable cause.

On page 14 counsel again departs from the record, and for the purpose of prejudicing this Court against

the defendants, attempts to apprise this Court of the fact that some months before the trial of the present cases, and before the delivery of the opinion of the trial court, the defendants Kester and Kettenbach were tried and found guilty of violations of the National Bank Act, in the same court in which the present cases were tried, but before a different judge, and of the affirmance of the judgment by this Court, and takes the position that the defendants not only swore falsely in defense of themselves at the trial of the bank cases, but that they directed and caused Robnett to make false entries in the reports to the Comptroller to conceal their unlawful use of the funds of the bank, much of which was used in the timber transactions involved in the present cases. Counsel might have gone further and apprised the Court of the fact that the defendants were acquitted upon every charge of the misue of the funds of the bank, abstraction, embezzlement, and making false entries in the books of the bank and any connection with Robnett in the matter of the charges against him (Robnett), and convicted upon the charge of making false entries in the reports to the Comptroller, which entries were made by Robnett and by Chapman. This, however, is not a matter for the Court to take into consideration in de-

termining the questions involved in these cases, and it is highly improper for counsel to inject the same into these cases, inasmuch as it is necessary for him to depart from the record in order to make the comment referred to on pages 14 and 15 of his brief.

Then, the charge that the defendants swore falsely in their own defense is unsupported by the facts in the case or by the evidence, and we do not believe that this Court should make an examination of the record in the bank case for the purpose of determining whether or not the defendants swore truthfully or falsely; but under any circumstances they could not have been guilty of as much perjury as the witness Robnett, the witness Steffey, and other witnesses who appeared and testified for the Government. We do not believe that the Court will arrive at a conclusion other than that Robnett was testifying under not only an implied, but an express agreement or understanding with the prosecuting officers, that he would be granted a full and complete pardon for the various offenses which he had committed in relation to the violations of the banking laws, embezzlement, falsification of the reports and of the books of the bank.

On page 15 of his brief counsel again departs from the record and refers to the assassination of former

Governor Steunenberg of Idaho, the confession of Orchard as to his participation therein, and his admitting his complicity in thirty-odd additional murders, his sentence to capital punishment, and the commutation of the same by the Governor. We desire to inquire what evidence there is in the record sustaining this comment? What evidence appears in the record that the now Junior Senator from the States of Idaho commuted the sentence of Orchard? Or what evidence is there in the record that the charges against Orchard were far more serious in their character than in the present case? When an attorney so far forgets himself that he abandons the record altogether and comments upon matters not appearing therein, and which have no bearing upon the case, it is conclusive evidence that the record, as it stands, is insufficient to sustain his contentions, and in order to induce the Court to reverse the judgment of the lower court it must take into consideration matters not appearing from the record, and matters which the lower court did not consider, and had no right to consider.

The evidence of Orchard and his pardon *is* much different from that of Robnett and his pardon. In the case of Orchard the trial court believed he testified truthfully; in the case of Robnett the trial court

believed he testified falsely. Notwithstanding this fact his pardon was recommended by counsel for appellant.

THE STEFFEY ENTRIES.

We have heretofore discussed the Steffey entries, referred to on page 16 of counsel's brief, and will not enlarge upon what we have said in relation thereto.

On page 17 of his brief counsel refers to the undefiled character and business and official standing of Kester and Kettenbach in the community, and again departs from the record and refers to evidence given in the bank case, which could only be done for the purpose of prejudicing this Court against the defendants; and it is apparent that the appellant is not trying this case upon the record as it stands now, but endeavoring to try the same upon the record made in the bank case.

On page 18 of his brief counsel states that he makes no attempt to excuse Robnett. I can hardly see why he should make an attempt to excuse Robnett. If there is any excuse due him, we are unable to find it. He reviews his employment as a clerk and bookkeeper in the Lewiston National Bank, and

then attempts to hold the defendants responsible for Robnett's embezzling the funds of the bank. Counsel might have gone further and stated that Robnett testified that the defendants Kester and Kettenbach knew of his embezzlement of the funds of the bank, which the jury disbelieved, and upon the indictments charging those offenses the jury found the defendants Not Guilty.

On page 19 of his brief counsel states that Robnett engaged with Kester and Kettenbach in their timber enterprises, in which they all used the funds of the bank. In order that their wrong-doing might not be discovered he made false entries in the books of the bank and in the reports to the Comptroller by their direction. Counsel again departs from the record, and we say that the evidence does not sustain the charge, and we see no reason why we should be again required to try out the bank case; and again we say that the jury found the defendants Not Guilty upon the indictment charging misappropriation of the funds of the bank, and making false entries in the books—either by directing Robnett to make the same or by making the same themselves.

On page 19 of his brief counsel states that "all we ask is that Robnett and his testimony, and Steffey and his testimony, be measured by the same legal

and moral standards as are the defendants and their witnesses and their testimony in these cases."

Then, we can hardly see the consistency of counsel's request that the evidence of Robnett and Steffey be measured by the same legal and moral standards as other witnesses who have testified. These other witnesses, especially the entrymen, have testified in behalf of the defendants and in behalf of the Government; they have had no interest in the outcome of the case—whether the patents were cancelled or whether they were not—made no difference to them. It did, however, make a difference to Robnett and to Steffey. Steffey admitted that he was guilty of perjury and of subornation of perjury. Unless he was protected by the officers in charge of this case as well as the criminal cases, he could have been indicted, tried and sent to the penitentiary.

Robnett had committed crimes enough involving moral turpitude to have required him to serve a term equal to the balance of his natural life, should he have lived a hundred years. He, then, had a strong motive for testifying falsely. There were many reasons for his protection by the officers. If he did testify adversely to the defendants, there was every possible reason for his protection by the officers, and this, we submit, was a strong and powerful

motive for both Robnett and Steffey to testify against the defendants, although they were compelled to commit perjury in so doing.

We therefore must respectfully contend that the evidence of neither Steffey nor Robnett is entitled to be measured by that legal or moral standard as the evidence of the defendants or that of the other witnesses who have testified in behalf of the defendants.

On page 22 of his brief counsel refers to the charge of conspiracy against the defendants, and bases that charge wholly and entirely upon the evidence of Clarence W. Robnett. This evidence is contradicted and impeached, not only by Kettenbach, Kester and Dwyer, but is impeached by Robnett's own evidence given upon the first trial of the criminal charges against the defendants, Kester, Kettenbach and Dwyer; is impeached also by the evidence of Colby, Emery, Bradbury, Bashor, the Longs, and by numerous other witnesses who have testified.

On page 30 of his brief counsel refers to the "Circle K" checks. We respectfully submit that there is nothing wrong, either civil or criminal, concerning the employment of William Dwyer by the defendants Kester and Kettenbach, their permitting William Dwyer to purchase certain tracts of timber land and pay for them by a check or draft drawn

upon Kester and Kettenbach through the Lewiston National Bank for the initial payments; and whether they were held as cash items in the bank and charged to the account of Kester and Kettenbach, or taken up by Kester and Kettenbach giving their own checks for the same, is immaterial. They had a perfect right to employ Dwyer for that purpose. They had a perfect right to pay him for his services, and there is nothing in relation to the Circle K checks which would indicate any wrongdoing by the defendants Kester and Kettenbach, Dwyer, or anyone else.

On page 32 of his brief counsel refers to the deposit slip in the handwriting of Kettenbach, and endeavors, by way of inference, to connect the same with the acquisition of certain tracts of timber land. This deposit slip bears date April 26, 1904, on the back of which were certain notations, referred to by the appellant, on page 32 of his brief.

The explanation offered by the defendants is straightforward, and is sufficient to utterly refute the theory advanced by the complainant. The amount shown by the face of the deposit slip represented money for which Mr. Dwyer gave his two checks to pay off a couple of workmen—timber cruisers—who had come to town and who desired to leave

on the morning train before the bank opened, which necessitated Mr. Dwyer's procuring the money elsewhere. As to the truth of Mr. Dwyer's explanation, his cancelled checks bear mute but irrefutable testimony to the truth of what he says. These checks appear at pages 4203-4204 of the record.

On page 3768 the defendant Dwyer testifies:

"Q. What were the circumstances of your giving these checks?

A. Why, I gave them to get some cash to pay a couple of men that was doing some work up the river, and before the bank opened in the morning. They were taking the morning train out.

Q. What were those men doing?

A. They were cruising, examining land for the purpose of laying—vacant lands, for the purpose of laying scrip.

Q. Who were they cruising for?

A. Well, they were cruising for themselves, *looking land* generally. They cruised for anybody, or would report land for anybody who paid them for it.

Q. I mean who did they—who was this information given for?

A. For Mr. Kettenbach.

Q. And Mr. Kester?

A. And Mr. Kester, yes, sir.

Q. I see the names of C. D. Whitney and C. Evans on the checks. Were they the two men?

A. Yes, sir.

Q. They were for $48 and $50. Was that the amount due the men at that time?

A. Yes, less $2 there that I got; I kept $2 for myself there for some purpose. My recollection

from looking over the checks there is that I wanted $2 for myself, and I just simply drew a check for $50 and gave—it was the Whitney check there—I gave Whitney $48 and I kept $2.

Q. That is your recollection about it?

A. Yes, that is my recollection.

Q. Do you know where these two men are at this time?

A. No, I don't.

Q. You have tried to find them since this came up?

A. Yes, I have made inquiries, but I can't find where they have been recently; I find where they have been four or five years ago, but not recently.

Q. Now, the back of this deposit slip shows Guy Wilson, $8, and various other names here, E. Taylor, $8; Dammarell, $8—total $96. Now, I will ask you if any part of this money was paid for filing fees or for any expenses of these parties whose names appear on the back of this deposit slip?

A. No, sir. That money was gotten so as those people could get away on the train. They came down the night before on a raft, down the river, and I told them I would get the money for them in the morning in time for them to make the train. I went to the cigar store and got the money.

Q. Do you have any knowledge of Kester and Kettenbach, or either of them, paying the filing fees or any expenses in relation to these various parties whose names appear on the back of this deposit slip?

A. No, sir."

The evidence of the defendant Kettenbach in relation to this matter appears on pages 3760 to 3766 of

the record. On pages 3760-3761 the witness testifies:

> "As far as the front of the deposit slip is concerned, I know nothing more than what it shows itself. It appears that I made out a deposit slip for Kittie E. Dwyer for $96, to the effect that it was two checks given to Wiggen for cash, just what it says on the face; and in the column on the left-hand side of the deposit slip there is an entry of $50 and $48, and below that is the word 'less cash' $2, then a line drawn, and '96'. Now, I made out thousands of deposit slips, and going back to 1904 I haven't any recollection any more than what the memorandum there on this deposit slip shows, as far as the front of it is concerned. On the back of the slip is a list of names. Opposite the names the figure 8 appears opposite each name, and there are twelve names with the figure 8 appearing opposite each one of them. Then a line is drawn and addition made, and 96 is the total. Then just below that there is another name and the figure 8 opposite that, and that appears to be subtracted from the total above, 96, leaving a net total of 88. This is in indelible pencil, and in my handwriting. As far as what constituted this, why, my best recollection is that it was a memorandum of moneys deposited in the Lewiston National Bank by some officer in the land office who had brought the money down to procure—was in the habit of bringing money down to procure drafts to send away to local newspapers for advertising fees, the amount paid by entrymen at the time of their original application. To bear me out in this, I have looked up their certificate of deposit register, and find there on the 25th day of April, 1904, there was a certificate

of deposit made to F. M. Roberts for $151.70, and one to the 'Pierce Miner' for $151.70; and to my knowledge I know that these were two local country newspapers nearest to the lands upon which people were filing in that locality,and the custom was sometimes to draw certificates of deposit individually, or at times to lump the whole sum and make out one certificate of deposit, and especially so if there was a large number of filers on any one day, the whole sum would be lumped by the land office officials, and one certificate made out. * * * I will say further that it was a common practice in the bank and for myself to use a blank deposit slip in the bank to make my memorandums on. People ordering drafts or anything, I would use a blank deposit slip to make my memorandums on, and those would not be crumpled up and thrown away, but would lie there, and very likely some depositor coming in later the slip would be used on the face in the proper place to make out the deposit; and from the fact that these certificates of deposit were issued to these newspapers for the land on the 25th, and the date of this deposit is the 26th, would show me that this deposit slip was used properly for Kittie E. Dwyer subsequent to its being used as a memorandum slip in making out the memorandums I have spoken of, which would have happened the day before; and that is the best of my recollection on the subject.' (Page 2763 of the record.)

(Here the witness reads the record of the Lewiston National Bank in relations to these accounts, as the same is made a matter of record in this cause.)

There is absolutely no evidence contradicting the evidence of the witnesses, and especially the refer-

ence to the checks, appearing on pages 4203-4204 of the record. On each of the checks appears, in the lower left-hand corner, the one appearing on page 4203: Defendants' Exhibit "V-2", Exp. C. Evans, just preceding the endorsement, Ed. L. Wiggin. On page 4204 of the record: Defendants' Exhibit "W-2" appears, Exp. C. D. Whitney, just preceding the endorsement, Ed. L. Wiggin. This is in the handwriting of William Dwyer, and was made at the time the checks were drawn.

It seems to us that the Court would hardly be justified in disregarding this positive evidence and the record evidence appearing from the books and documents offered, and adopt the view of counsel, which can only be sustained by inferences, surmises and conclusions drawn.

On page 36 of his brief is a reference and a discussion by counsel under the heading, "PERSONS SOLICITED BY KESTER, KETTENBACH AND DWYER WHO DID NOT MAKE ENTRY". The first name appearing in counsel's brief, page 36, is that of F. G. Morrison. It appears that the witness Morrison was highly perjudiced against the defendants, and on cross-examination, at page 1221 of the record, the witness testifies: That it was about 1902 or 1903 the conversation occurred; and on page 1222

the witness admits that he testified differently at the time he testified in this case than he did at the time he testified at Boise in the criminal case; that when he testified at Boise he never mentioned the name of Kettenbach, and he finally contends that he did say Kester and Billy, meaning Mr. Kettenbach, but when pressed for an answer, on page 1223 he states:

> Q. You say now, Mr. Morrison, that he had the arrangement made with Kester and Billy?
> A. Kester and Billy.
> Q. Kester and Billy?
> A. Yes, sir.
> Q. You are sure of that?
> A. I am sure of that.
> Q. Then the stenographer took down your evidence wrong?
> A. Over there I might not have said it.
> Q. You might not have said it?
> A. I might not have used Mr. Kettenbach's name."

And on page 1224 the witness testifies:

> Q. You are not on very good terms with Mr. Dwyer, are you?
> A. Well, I am not on kissing terms, or anything of that kind.
> Q. You and Dwyer haven't been on very good good terms for some time?
> A. Well, he would speak to me if I would let him, but I forbade him talking to me at all.
> Q. When did you forbid him talking to you?
> A. Oh, well, you heard me forbid him yourself once.

Q. Well, when was the first time?

A. Oh, five or six years ago.

Q. And you haven't been on good terms since you had some lodge troubles over there, have you?

A. Well, I wasn't in the lodge business at all, I told you before.

Q. You had trouble a long time ago?

A. It wasn't over lodge business that we had trouble over.

Q. Your wife and Mrs. Dwyer had some lodge troubles?

A. I never mixed in that at all. I wasn't in the house during the trial. I had nothing to do with it.

Q. But you haven't been on good terms with Dwyer for a good many years, have you?

A. No, nor I don't want to any more.

Q. You have no use for him?

A. No, not in the least.

Q. Do you think if he loses all his land that Kester and Kettenbach should lose theirs?

A. Well, I have nothing to say in regard to that business.

The witness also testifies that he had no trouble over lodge matters, and that this conversation occurred in the early summer of 1902 and that it was not earlier than 1902.

The witness Kittie E. Dwyer, on page 3427 of the record, testifies that she, the witness, Frank G. Morrison, and his wife, Mrs. Morrison, were members of the same fraternal order or lodge in 1901:

"MR. TANNAHILL.—Q. I will ask you if you and Mr. Dwyer and Frank G. Morrison had any trouble in that order?

A. We did.

MR. TANNAHILL.—Q. What order was it?

A. In the Rebekahs.

Q. Have you anything—any record—by which you can fix the date—about the date—that trouble occurred?

WITNESS: I have a Past Noble Grand's receipt.

Q. Will you produce it, please?

A. There was something that Mr. Morrison said about me, and we have never been on speaking terms since. (Handing document to Mr. Tannahill.)

Q. This certificate is signed by Nellie S. Ramsey, Secretary. Are you acquainted with her signature?

A. I am.

Q. And she was Secretary of the Lodge at that time?

A. Yes, sir, she was.

Q. And this was issued July 4th, 1901, the day it bears date?

A. I think it was. The seal of the lodge is on it.

Q. And you was Noble Grand up to the 30th of June, 1901, as stated in this certificate?

A. I was.

MR. TANNAHILL: We offer this certificate in evidence and ask that it be marked the proper exhibit. * * *

Said document was thereupon marked by the Reporter as Defendants' Exhibit J-1, (appearing at page 4174 of the record).

"Mr. Tannahill.—Q. Now, was it before or after this certificate was issued that you had that trouble?

A. It was during the term of office, in the month of April. My term commenced on January 1, 1901, and ended June 30, 1901.

Q. And it was in April when this trouble occurred?

A. Yes, sir.

Q. Between Frank G. Morrison and Mrs. Morrison, and yourself and Mr. Dwyer?

A. Yes, sir; we have never spoken since.

Q. And Mr. Dwyer and Frank G. Morrison have not been on speaking terms since?

A. No, sir, not to my knowledge.

The evidence of Mr. Dwyer is to the same effect. He denies that he ever had such a conversation with Mr. Morrison, and states that he was not upon speaking terms with Mr. Morrison at the time that Mr. Morrison states that he had the conversation with him.

There was never an entry of Frank G. Morrison's involved in this proceeding, and it is immaterial whether or not the conversation did occur, but, measured by the weight of the evidence, the credibility of witnesses, and the appearance of the witnesses upon the stand, we respectfully contend that the evidence on the part of the defendants in relation to this instance is decidedly in their favor.

JOHN. P. ROOS

On page 37 of his brief counsel for appellant refers to the eviednce of John P. Roos, who did not file upon a tract of land, but states that George H. Kester solicited him to file. The witness' evidence appears at pages 1209 to 1213 of the record, and on page 1211 states that the reason that he can remember the exact language used is that he has testified three or four times and that he is testifying now in accordance with what he testified before, as far as his memory goes; that his memory is nothing exceptional. On pages 1212 and 1213 the witness states:

> Q. Did you ever make any statement to any Government officials?
>
> A. Did I ever make a statement?
>
> Q. Yes?
>
> A. Just prior to the first time that I was taken to Moscow Mr. Johnson stopped me on the street and asked me to come to his office, which I did two or three days later. He asked me regarding the conversation that I had with Mr. Kester, and I told him there was no conversation; that I knew nothing at all about it; and he told me all that I knew, and I then told him the exact conversation, and he took it down on paper and wanted me to swear to it, or sign it, which I refused to do.
>
> Q. Mr. Johnson first repeated the conversation to you; was that it?

A. He asked me regarding it, and I told him I knew nothing about it, and then he repeated it to me.

Q. And then he repeated it to you?

A. Yes, sir.

Q. And you are testifying now to the conversation that Mr. Johnson repeated to you?

A. I am testifying to the conversation I had with Mr. Kester.

Q. Answer my question: Are you testifying now to the conversation that Mr. Johnson repeated to you?

A. I am testifying to my conversation with Mr. Kester and not what my conversation was with Mr. Johnson .

Q. Didn't you just say that Johnson repeated the conversation to you, and told you all you knew about this?

A. He told me all regarding it.

Q. He told you all regarding it?

A. Yes, sir.

Q. Then he repeated this conversation with Mr. Kester to you, didn't he?

A. Along the same lines; perhaps not just exactly.

Q. And that refreshed your memory, didn't it?

A. No, sir.

Q. Your memory has been refreshed on this matter several times, hasn't it?

A. No, sir.

Q. But Johnson did repeat the conversation to you, didn't he?

A. *He outlined it.*

Q. Before you told him anything about it?

A. He outlined it and told me regarding it, but he didn't know the exact situation or anything of that kind, or condition.

Q. But he repeated the conversation to you in substance, didn't he?

A. Yes, I believe so, in substance.

Q. The same as you have testified to here?

A. Well, perhaps not the same as I am testifying to it here, but the same in substance.

Q. The same as you are testifying here to, in substance?

A. *In substance, yes, sir.*

Q. This was Miles S. Johnson who talked to you about this, was it?

A. Yes, sir. (Page 1213 of the record.)

It has always been a mystery to the defendants how Mr. Roos could have been so badly mistaken. His evidence was at all times at variance with that of Mr. Kester and Mr. Kettenbach, and Mr. Kester has testified that he had no recollection of having any such conversation with Mr. Roos, although he had talked with him at one time and asked him if he had taken a claim, and about what claims were worth; that Mr. Roos said that he wanted to get a better claim than that. But it is clear to us now how it occurs that he is so testifying. Miles S. Johnson was in the employ of the Government, and met him on the street called him to his office and detailed a conversation for him to testify to, and having heard that he and Mr. Kester had a conversation concerning the taking up of a timber claim, Mr. Johnson details this conversation, and in some man-

ner induced Mr. Roos to remember it that way. He wrote it out for him; wanted him to sign it and swear to it, but Roos refused to do that, but he actually went upon the stand and swore to it in that way. His evidence is false. Whether he knew it was false or not is immaterial, but it is certainly false for the reason that it is at variance with Mr. Kester, and Mr. Kester never at any time asked him to purchase his right. He knew that he could not sell his right, and he had no such conversation as the one related by Mr. Roos, and as detailed to Roos by Johnson.

As we have heretofore set forth, Roos did not file upon a tract of land; no land of the witness is involved in the proceeding, and it is immaterial whether his evidence is true or false; but, however that may be, the evidence on the part of the defendants far outweighs that on the part of the prosecution, much less is the same clear, positive, unequivocal and convincing.

Counsel in his brief, at page 37, refers to the evidence of Samuel C. Hutchins. We see little in the evidence of Samuel C. Hutchins to discuss. His recollection of what occurred is not very definite, is at variance with that of the defendants, and as Hutchins did not take a claim, and no land of the

witness Hutchins is involved in this proceedings, we do not feel called upon to enlarge upon his evidence here.

WENN W. PEFFLEY.

We next call the Court's attention to the evidence of Wenn W. Peffley, referred to on page 37 of counsel's brief. His evidence appears at page 1206 of the record, in which the witness testifies:

> Q. What was that conversation?
> A. I asked him regarding taking up a timber claim, having heard something about it, and he informed me that there was a party leaving in a few days and I could accompany them, and that it would clear me about $150.00.

On cross-examination, at page 1208, the witness testifies that he applied to Kester to locate him on a timber claim.

> Q. Mr. Peffley, I believe you said you went to Kester and asked him about taking up a timber claim?
> A. Yes, sir.
> Q. And he told you that there were some parties leaving in a few days?
> A. Yes, sir.
> Q. And then did you ask him about what you would be able to make out of it?
> A. Why, I naturally would; I believe I did.
> Q. And he told you that you ought to be able to make $150.00 out of it?

A. No; he said definitely; he said, "It will be worth $150.00 to you."

On page 1208 the witness testifies in relation to the evidence he gave at Boise in the criminal cases:

Q. I will ask you if you testified in substance as follows: "Question. I believe you said you went to Mr. Kester and asked him about it?" Answer. I met him on the street and asked him, yes, sir." "Question. And you asked him some thing about the value of the claims?" "Answer. Well, I asked him what we would get out of it in case we took claims." "Question. And he said it ought to net you about $150.00?" "Answer. Yes, he said it would net us about $150." Is that about the facts?

A. Yes, sir.

Q. You don't remember the exact language that was used either by yourself or by Mr. Kester?

A. No, I don't remember exactly the words that was said.

Q. But that is the substance of it?

A. He conveyed the idea that we would get $150.00 out of it.

The Court will observe that counsel takes the position that Wenn W. Peffley was solicited by Kester to file upon a claim, while the witness testifies himself that he went voluntarily to Kester and asked Kester to locate him upon a tract of land.

We can see nothing in the evidence of Wenn W. Peffley inconsistent with that testified by Mr. Kester, and nothing that will bear out the contention

that Kester solicited Peffley to file upon a tract of land.

ANDREW J. SHERBURN.

On page 38 of counsel's brief he refers to the evidence of Andrew J. Sherburn, and contends that Mr. Dwyer solicited Sherburn to file upon a tract of land, the evidence of Mr. Sherburn appearing at page 1214 of the record, and the cross-examination of Mr. Sherburn apeparing at page 1216 of the record, wherein the witness testifies:

CROSS EXAMINATION

Q. Dr. Dwyer is quite a fellow to joke, is he not, Mr. Sherburn?

A. Yes.

Q. As a matter of fact, he knew that you had lived here for a long time, didn't he, Mr. Sherburn?

A. Yes, sir.

Q. Knew that you were acquainted with the Register and Receiver?

A. Yes, sir.

Q. Knew that you had proved up on two claims before?

A. Yes, sir.

Q. And he knew that you was favorably known and stood reasonably well in the community?

A. It was surprising to me that he should ask me to do such a thing.

Q. I see. Well, as a matter of fact you knew that he did that more in a joke than in any other way, didn't you?

A. Yes, I think so.

Mr. Dwyer states that he made a similar statement to Mr. Sherburn, but that it was made in a joking way, and he never at any time desired that Mr. Sherburn file upon a tract of land, under an assumed name or otherwise. Then, there is no land of Mr. Sherburn's involved in any of these actions, and the evidence of the witness is wholly immaterial, even if Mr. Dwyer had solicited him to file upon a timber claim, under an assumed name or otherwise.

CLAIMS INVOLVING THE LAMBDIN ENTRY.

On pages 38-39 of appellant's brief is a discussion of the Lambdin entry. We have heretofore referred to this entry, and will not enlarge upon what we have there said, except to direct the Court's attention to the evidence of William Dwyer, appearing at page 2329 of the record, and that of George H. Kester, appearing at page 3160 of the record.

THE SHAEFFER ENTRY.

On pages 39 and 40 of appellant's brief is a reference to the Shaeffer entry. We have heretofore referred to this entry, and will not enlarge upon what we have there stated, except to call the court's attention to the evidence of George H. Kester, pages 3165 to 3166 of the record, in which the witness testifies:

> A. Mr. Shaeffer came to me one day and said that he had been talking with Mr. Dwyer about getting a timber claim, and said that he hadn't the funds necessary to pay for the land, and wanted to know if I would loan him the money to pay for the land, and later he came in one day and said that it was time for him to prove up, and wanted the money to pay for the land at the land office, and I took his note for the amount that he would require, and either that day or the next day he came and handed me the final receipt from the land office for the purchase of the land, simply, I suppose, to hold as a sort of security for the loan; and within a short time after that I purchased the land from him, after looking the matter up and seeing what sort of a claim he had.
>
> Q. Did you hear his evidence wherein he stated that you paid his expenses up to the land?
>
> A. I never paid any expenses for him of the land; I remember that he used to get advances against his salary, he did on several occasions.
>
> Q. His salary as janitor of the bank?
>
> A. As janitor of the bank; yes.

Q. Did you ever have any conversation with him that you would give him $100.00 for his right and you pay all expenses?

A. No, sir.

Q. Did you hear the evidence of Clarence Robnett wherein he stated that he overheard a conversation between you and Shaeffer, wherein he stated that you agreed to pay him $100.00 for his right and him deed the land to you?

A. Yes, sir.

Q. Did you ever have any such conversation as that?

A. No, sir.

Q. When was it that the negotiations began for the purchase of the Shaeffer land, in relation to the time he made final proof?

A. After he had made final proof.

Q. And you agreed on the price, did you?

A. Yes, sir.

And you paid the purchase price?

A. Yes, sir.

Q. What disposition have you made of that land?

A. That land has been sold?

Q. Do you remember to whom it was sold?

A. I think that land was sold to the Potlatch Lumber Company.

Q. And you received the purchase price, did you?

A. Yes, sir. (Page 3167 of the record).

THE MARIS ENTRY

On page 41 of his brief, counsel refers to the entry of Carrie D. Maris. We have heretofore referred to and discussed the evidence in support of and against

the regularity of this entry, and will not enlarge upon what we have there stated, save and except to call the Court's attention to the evidence of George H. Kester, appearing at page 3167 of the record, and the evidence of William Dwyer, appearing at page 3333 of the record. On page 3167 the defendant Kester testifies:

> Q. What do you know, if anything, concerning Carrie D. Maris acquiring title to a tract of land?
>
> A. I know nothing whatever about her acquiring title to the land, and the first that I had to do in any respect with that land was when Robnett came to me one day at the bank and said that he had a claim up there the other side of Pierce City, near the forest reserve, that he had been offered $1,500.00 for, by Mr. Cameron, I think he said, and that he had been holding the land for $1,600.00, that it was a pretty good claim, and he felt that it was worth more than $1,500.00, and that he didn't want to sell it for $1,500.00, but that he felt like he had to sell it, and wanted to know if I wouldn't look the matter up and see if I couldn't pay him $1,600.00 for it. And I think I called Mr. Dwyer up, I think I got in communication with Mr. Dwyer at Pierce City, and asked him to go out over that land and make a report as quick as he could on it. And he went out and looked the land over and came back and reported to me that it was a good buy at $1,600.00; and I then told Robnett that I would buy the claim for $1,600.00. He would have been very glad and willing to have sold it for $1,500.00 if I wouldn't have paid him the $1,600.00, as far as that is concerned, but I felt

that it was worth $1,600.00, and I was willing to pay the $1,600.00, and the transaction was closed, and that is the very first that I knew about it. * * * *

Q. Did you have any notice or knowledge of any prior agrement that he had for the purchase of the land before she made her final proof

A. No, sir.

In support of the evidence of Mr. Kester, Mr. Dwyer testifies to substantially the same state of facts relative to Kester's calling him up, asking him about the claim, his making an estimate of the timber thereupon, and his report to Mr. Kester. (Page 3333 of the record.)

In relation to the William B. Benton entry, appearing on page 43 of appellant's brief, the Joel H. Benton entry appearing on page 44, the Robertson entry appearing on page 48, the Ferris entry appearing on page 51, it is sufficient to say that these entrymen are in conflict with Robnett, and the only evidence in support of the charges in the bill in relation to these entries is the unsupported evidence of Clarence W. Robnett; and inasmuch as the defendants' evidence is supported by that of the entrymen themselves, we do not feel called upon to reply to counsel's brief in relation to these entries.

We have heretofore referred to the evidence in relation to the Hansen entry, appearing on page

54 of counsel's brief, the Waldman entry, appearing on page 57, the Little entry, appearing on page 60, the Herrington entry, appearing on page 63, the Pierce entry, appearing on page 67, the Bashor entry, appearing on page 68, the Long entry appearing on page 71 the John H. Long entry, appearing on page 73 ,the Benjamin F. Long entry appearing on page 75, the Morrison entry appearing on page 78, the Hyde entry apeparing on page 79, the Ferris entry appearing on page 81, the Robertson entry, appearing on page 84, and the Gammon entry appearing on page 88, all of appellant's brief, and we do not feel called upon to add to what we have hereto fore said. It is sufficient, however, to state that the entrymen are all in conflict with the witness Robnett, and the only evidence in support of the charges of irregularity or fraud in relation to these entries is the unsupported evidence of the star witness Clarence W. Robnett.

Robnett says that he made an offer to and did sell these lands to the defendants. That prior to making the sale he told the defendants of the manner in which he acquired the lands, the irregularity in the proceedings, and the prior agreements with the entrymen. It is unreasonable to suppose or presume that Robnett was trying to sell these claims to

the defendants, and trying to obtain the best price he could for them ,and would, at the same time, tell the defendants of irregularities, fraud and prior agreements in relation to the acquisition of title to the lands. We do not believe the Court will be inclined to lend any weight to the evidence of Robnett in support of the various charges.

See evidence Robnett p. 2338-2339-2340-2341-2342. On page 2639 Robnett admits that he testified in the first criminal cases and his evidence is the reverse of what it is here, also p. 2521-2551 to 2636 of the Record.

SUMMARY OF EVIDENCE CONCERNING THE ROBNETT GROUP.

From page 91 to page 100 of appellant's brief is an argument under the heading "Summary of Evidence concerning the Robnett Group."

We have heretofore presented our argument concerning the Robnett entries, and do not feel called upon to enlarge upon what we have heretofore said. We, however, call the Court's attention to the fact that the only evidence as to irregularity in connection with the Pierce, Morrison, Hyde, Hanson, Little, Herrington, Bashor, the three Longs, Ferris, Lewis,

Gammon, Robertson, and Nelson entries, is the unsupported evidence of Robnett. An examination of the evidence of Little, Lewis, Gammon, George Ray Robinson and others will show that the defendants purchased their claims with a great deal of reluctance. That each thereof applied to the defendants repeatedly in an effort to sell their claims, and were requested by the defendants to see other timber buyers and endeavor to sell to some one else. After repeated efforts, and giving options to various parties, they were unable to sell, and finally sold to the defendants.

In relation to the Maris entry, the evidence of Carrie D. Maris is that Robnett made repeated efforts to sell the land. The witness sat in the Directors' room of the Lewiston National Bank, heard Robnett call up Nat Brown from Moscow, a timber buyer, and other parties, in an effort to sell the land. It was some time aftes these repeated efforts that Robnett finally sold the land to the defendants.

Likewise the evidence is conclusive that after repeated efforts on the part of Robnett to sell the Hanson claim to other parties, it was finally sold to the defendants.

On page 95 counsel again departs from the record, and copies certain portions of the evidence given in another case. The lower court decided the case upon the evidence as he found it in the record, and not upon the imagination that some state of facts other than that appearing from the record. Then, it is no offense to make a hazardous loan and receive a bonus therefor for taking the chance, if the borrower is willing to pay the bonus, and the party who loans the money is willing to take the chances. None of this money went to Kettenbach. In a few instances where loans were made for his relatives, the money went to the relatives. In other instances it is not clear who received the bonus, and it is not unlikely that a portion of the same, or all thereof, went to Robnett.

THE EMERY AND COLBY GROUP.

We have heretofore referred to this group of entries, copied at length in this brief the evidence of Colby, Emery, Kester and Kettenbach, and believe that the same is sufficient to overbalance the unsupported evidence of Robnett.

On page 114 of appellant's brief is a reference to the Cornell entry. As we have heretofore stated, it

is a question whether the Court will believe Cornell, under existing conditions, and in view of the fact that he exhibited such a high degree of prejudice against the defendants, when his evidence is impeached by that of William Schultz and of Ab Masters, or whether the Court will believe George H. Kester, whose evidence in relation to this entry appears on pages 3161 to 3164 of the record, and William Dwyer, whose evidence appears at page 3330 of the record. Then, this claim has long since been sold to an innocent purchaser, without notice of any irregularity, if any such did exist.

On page 121 of appellant's brief appears a reference to what is termed or called "The Line-up." The evidence of Dwyer in relation to this matter appears at pages 3308-3316 of the record. On page 3307 the witness details the manner in which the lands were cruised, and on page 3308 the witness testifies that certain lands which he had cruised were covered with Skuse scrip—scrip laid by J. J. Skuse—and the lands the witness went to select for the State were covered with this Skuse scrip; and this State selection was made in 38-5, East. That the instructions from Mr. Goldsmith, under whom the defendant Dwyer was working, were that he should select land in a body to be covered with the

State's filings, and these selections were made in 38-5, East; and at the bottom of page 3309 the witness testifies that he furnished Mr. Goldsmith with the minutes and the estimate of the land for the purpose of the State's filings; and on page 3310 he testifies to the manner in which this land was covered with Stone and Timber filings, in which he testifies:

"Q. Now, what subsequently became of that land.

A. Why, I filed timber and stone——

Q. Just wait a minute. Was this scrip—this Skuse scrip—who was it laid that scrip?

A. S. P. Fitzgerald.

Q. Now, was that land taken by the State?

A. No, sir.

Q. Now, did Kester and Kettenbach lay any scrip in this same township, subject to the State's rights?

A. Not in that township. They did in 39-5, and 40-6.

Q. And did you cruise that at the same time?

A. No. Mr. Lafferty cruised that.

Q. Lafferty cruised that?

A. Yes, sir.

Q. And did the State select the lands that were filed on—that the scrip filings covered, or Kester and Kettenbach subject to the State's rights?

A. Yes, sir.

Q. Now, what subsequently became of this land that was filed on that was covered by the Skuse scrip?

A. Why, I filed timber and stone entries over it.

Q. Now, can you name some of the people that you located on that land?

A. Why, I located Mr. and Mrs. Hopper, I think, Miss Elizabeth Kettenbach, Mrs. White, Jackson O'Keefe—well, there are some more, but I can't recollect who they are.

Q. And that same land you had furnished Mr. Goldsmith with the minutes of it and your estimate of it for the State to file on before?

A. Yes, sir.

Q. Now the people that you located on that land, how did they come to file ahead of the Skuse scrip?

A. How did they?

Q. The Skuse scrip, as I understand you, was laid before the land was subject to entry, but laid subject to the State's rights. Now, how did the stone and timber claims come to be filed ahead of the scrip?

A. Why, the scrip was rejected, but if the scrip owner had got in ahead of the timber and stone entrymen and reapplied for that land, why he would have what they called kept the scrip alive; they couldn't reject it after the State's right had been exhausted; the first one that came with the application got the land, either the timber and stone, or you could have put the scrip on it if you wished.

Q. Did you hear the evidence of the witness Joseph H. Prentice, of Clarkston, that he was fifth in line, and S. P. Fitzgerald offered him $500.00 for his place in the line?

A. Yes, sir; I was there.

Q. Was that the same S. P. Fitzgerald that laid this Skuse scrip?

A. Yes, sir. He sent another man there to break through the line. He sent a man by the name of Kays the same day.

Q. And as I understand you to say, you had cruised that land before you went up there with Mr. Goldsmith?

A. Oh, yes; I had worked in there a couple of years.

Q. Did you hear the evidence of J. C. Jansen relative to the timber on a portion of this land, or that the State could have gotten better land than it got in this section?

A. Yes, sir.

Q. What have you to say about that?

A. Why, he don't know what he is talking about.

Q. And you was in that country when Jansen claims that he was in there and cruised this land?

A. In the winter of 1903 and 1904?

Q. Yes.

A. That was the winter that we was working for the State. We never saw a track in there—not a mark—never met a homesteader."

It thus appears from the evidence of Mr. Dwyer and the land office records showing the filing of this Skuse scrip, that this land was originally cruised and the minutes furnished the officers in charge of the State's selections, and it was supposed they would select that land. That the witness had cruised other lands upon which scrip was laid for Kester and Kettenbach, subject to the State's rights. That the State finally came and selected the land upon which Kester and Kettenbach had laid the scrip, and did not take the land which Mr. Dwyer

had cruised for the State, and of which he had furnished the officers the minutes. That upon this land scrip was laid for John J. Skuse by S. P. Fitzgerald, who offered Joseph H. Prentice $500.00 for his place in line. If counsel's contention that the land upon which the timber and stone entrymen filed is the best land, it is clear that if the timber and stone entrymen had not held their places in line, and filed their timber and stone entries upon it, that it would now be in the hands of the Timber Trust, where it appears that the officers in charge of this prosecution are seeking to place it. It seems to me that it was the Timber Trust which tried to, and did, work the State's officers—and by this I do not mean Mr. Goldsmith, but the officers who had in charge the filing upon the State's lands, Mr. Jackson and Mr. Laferty. We do not charge this was done, but the record convinces us that no consideration was shown defendants—but consideration was shown Fitzgerald, who had charge of the Skuse scrip.

On page 124 of appellant's brief is another referenec to the line-up at the Land Office, and on page 125 appears the names of twenty-five entrymen who, it is claimed, appeared in that line-up. Out of these twenty-five it appears that the defendants have not purchased the claims of Geo. H. Kester, Elizabeth

Kettenbach, Elizabeth White, William J. White, Mamie P. White, Martha E. Hallett, or Edna P. Kester. That the claims of Hattie Rowland, and of Frances A. Justice were purchased by Kittie E. Dwyer, leaving only ten of the claims that were purchased by the defendants Kester and Kettenbach; and we call the Court's attention to the evidence of Joseph M. Molloy, appearing at page 2014 of the record, wherein it appears from undisputed evidence that there were in line forty-two entrymen. The defendants could not have been doing a wholesale business in the matter of purchasing claims, notwithstanding the fact that Dwyer obtained a location fee from the most of them.

We respectfully submit that the conclusions drawn by counsel that this line-up was organized by the defendants for the purpose of purchasing the claims, and that a prior agreement existed with each thereof, is far-fetched, unwarranted by the undisputed evidence, and unsupported by any fact or circumstance in the case.

At the bottom of page 125 of appellant's brief counsel makes the broad statement that each entryman was induced to make the entries, either by Kester, Kettenbach, or Dwyer, personally, or by their agents. We inquire what evidence thereis that the

defendants induced Jackson O'Keefe to make the entry, or Charles W. Taylor, or Joseph H. Prentice, or Edgar J. Taylor, or Edgar H. Dammarell. It appears that O'Keefe applied to the defendants, and especially to Dwyer, to locate he and his nephews upon a timber claim.

George H. Kester filed upon a timber claim himself. The evidence of Guy L. Wilson and of Ella Wilson, his wife, is that they went to Dwyer's home and asked Dwyer to locate Mr. Wilson upon a timber claim. The same condition appears in relation to the entry of Frances A. Justice. She induced Dwyer to locate her upon a timber claim, and paid him a location fee. The same condition appears in relation to Elizabeth Kettenbach, Elizabeth White, William J. White and Mamie P. White and Martha E. Hallett, Daniel W. Greenburg, David S. Bingham, Hattie Rowland and William McMillan. There is absolutely nothing to justify the statement that the defendants induced these entrymen and entrywomen to file upon a timber claim.

Likewise the statement on page 126 of appellant's brief, where counsel states that Martha E. Hallett and the kinsfolk of Kester and Kettenbach still hold the title to the entries made by them, for the benefit of said defendants. This assertion is unsupported

by the evidence, and is contradicted and refuted by the evidence of the entrymen and entrywomen themselves.

On page 169 is a reference to the evidence bearing upon all of the entries in the line-up. We call the Court's attention to the evidence of J. M. Molloy, appearing at page 2014 of the record, for the purpose of showing that counsel has not referred to one-half of the entrires of the parties in the line-up; and again repeat that there are very few of the entries in the line-up which were purchased by the defendants Kester, Kettenbach and Dwyer.

On the same page of appellant's brief is a reference to the deposit slip offered in evidence, and a discussion of the evidence in support of the same, which we have heretofore considered, and our discussion and argument and copy of the evidence appears elsewhere in this brief, and we will not enlarge upon what we have there stated.

On page 174 is a discussion under the head of "Evidence Concerning the O'Keefe Group and the Kester, Kettenbach and Dwyer Group ("The Line-up").

We do not care to enlarge upon what we have heretofore stated concerning this matter, but call the Court's attention to the evidence of William

Dwyer, appearing at page 3319 of the record, as well as the evidence of Frances A. Justice, wherein it appears that David Justice, husband of Frances A. Justice, went to the land for the purpose of examining the same and taking a timber claim. That the timber was not of a good quality, as he viewed it, and he therefore did not take a timber claim. This is a circumstance showing that the contention of counsel is unfounded in fact, and strongly supports the evidence of the defendants and the witnesses who have testified in their behalf. If there had been a prior agreement for these various entrymen and entrywomen to sell their rights, and to take up a piece of land and transfer it to Kester and Kettenbach for a specified sum, what difference would it have made to David Justice whether or not the timber was valuable? He would have taken the land just the same. But in view of the fact that he did not consider the timber sufficiently valuable to pay him to take a piece of land, pay the purchase price, and pay Dwyer a location fee, and did not take a claim, it is a circumstance which strongly supports the evidence of the defendants that no fraud or irregularity existed in the acquisition of title to the land.

On page 177 of appellant's brief is a discussion under the heading of "Kester and Kettenbach secure

appointment of Dwyer to assist in making State selection in said Township." This assertion is based wholly and entirely upon the unsupported evidence of Clarence W. Robnett, which is contradicted, impeached and denied, not only by the evidence of each of the defendants but by that of Goldsmith. On page 3268 of the record Mr. Goldsmith testifies concerning the evidence of Clarence W. Robnett wherein Robnett testified that Mr. Kettenbach called Mr. Goldsmith into the bank and said to him:

> "A. * * * 'Mr. Goldsmith, what I sent for you for was to see if we couldn't arrange to appoint Mr. Dwyer as one of your selectors to cruise the timber and make the selections for the State,' and Mr. Goldsmith says, 'Well, I really don't know how I can do that, but I will see.'
>
> Q. Did you have any such conversation as that?
>
> A. No, sir; I did not."

In response to the other statement made by Robnett, Mr. Goldsmith testified as follows Page 3268 of the record:

> "A. Well, he said Mr. Dwyer was out of the State, and there might be objections to it, and he thought that perhaps already there had been people spoken to by Mr. Jackson for that position, but if he could arrange it he would do so.
>
> Q. Did you have any such conversation as that with Mr. Kettenbach?
>
> A. No, I didn't. I employed Mr. Dwyer on my own responsibility, on Mortz' recommendation."

On page 3269 is another reference to the evidence given by Robnett, wherein Robnett stated that Kettenbach stated to Goldsmith as to Dwyer being a resident of the State of Washington, which is across the line, and Clarkston was practically the same as Lewiston, and that Dwyer was operating up in the timber, and that would not be any reason why Goldsmith should not get a man across in Clarkston, to which Mr. Goldsmith answered:

> "A. No, sir; that is absolutely false—absolutely false."

On page 3270 is also the evidence of Mr. Goldsmith contradicting that given by the witness Robnett.

On page 3316 appears the evidence of William Dwyer, wherein he denies that he ever had any conversation with Mr. Goldsmith or with Mr. Kettenbach concerning his appointment as State Land Selector, and details how he came to be appointed, and in response to the following question:

> "Q. I will ask you, Mr. Dwyer, if you ever at any time made any suggestion to Mr. Goldsmith that he leave out any particular lands for the purpose of enabling you to locate timber and stone entrymen upon them?
>
> A. No, sir I never did.
>
> Q. And did you leave out any valuable lands for that purpose, or for any other purposes,when you was cruising the land for Mr. Goldsmith?
>
> A. No, sir. He had a record of all the lands that was cruised, excepting this plat of 39-4 here.

Q. And you worked under his directions all the time?

A. Yes, sir." * * *

On page 3317 appears the evidence of Mr. Dwyer that his selections were afterwards checked over by the State, and that no objection was found to them, and that they contained the most valuable land of any selections ever made by the State.

The argument and contention of counsel in relation to the securing of the appointment of Dwyer, so as to enable the defendants to make the State land selections, and better facilitate the filing of timber and stone entrymen thereupon, is unsupported by the evidence, and we do not believe the Court will feel that it should take or accept the unsupported evidence of Clarence W. Robnett in relation thereto.

KESTER'S ATTEMPT TO INFLUENCE ACTION OF CHIEF CLERK OF LAND BOARD.

On page 180 of appellant's brief is a reference to the evidence of Mr. Jackson, which was read into the record over the objection of the defendants, and which now appears in the record, it not having been taken in accordance with the statute for the taking of such deposition, but, however that may be, there is no evidence which justifies the statement of coun-

sel that Kester attempted to influence Mr. Jackson. Kester's version of his meeting Mr. Jackson is set forth at page 3175 of the record, and is a full and complete explanation of any inference which might be drawn from Mr. Jackson's statements.

It appears that Fitzgerald, Skuse, and other well-known representatives of the Timber Trust, did influence Mr. Jackson, and induced him to leave out of the State's filings what counsel now contends was the most valuable land, and induced him to select for the State those lands upon which Kester and Kettenbach had offered scrip, and left what counsel contends were the best lands for the Timber Trust, and scrip was laid upon those lands by Fitzgerald, acting for John J. Skuse; and when this was brought to the attention of Dwyer he then arranged the line so that the parties whom he had taken to the land, and who had agreed to pay him a location fee, could file on the land which was covered by the rejected Skuse scrip, and which Fitzgerald made such a desperate effort to re-lay before the Timber and Stone entrymen could have an opportunity or a chance to file.

In view of the circumstances, counsel's argument will certainly find as little favor with this Court, as it did with the lower Court.

DWYER CONTESTS.

On page 181 of appellant's brief is a reference to certain contests filed by the defendant William Dwyer.

We have heretofore stated that Dwyer was a timber cruiser; had gone in and cruised out certain lands; the manner in which the cruising was done; that he had arranged to locate certain Timber and Stone entrymen upon the lands for a consideration, in some instances $100, and in some instances $200.

On page 3362 of the evidence of Dwyer appears a reference to the homesteads which were filed, and that these homestead entrymen were conducted to the land in charge of Fitzgerald and one Jensen, and on page 183 of appellant's brief is a reference to the entries of Walter Williams, Albert J. Flood, William R. Lawrence, and others. A reference to the evidence of T. H. Bartlett, Register, page 3053 of the record, appears the affidavit of Walter Williams in which he states, under oath, that he made settlement upon the land March 15, 1903. On page 3055 of the record appears the affidavit of Albert J. Flood, wherein he states, under oath, that he made a settlement upon the land on the same date. On page 1028 of the cross-examination of Walter Williams, it appears that he testified when upon the stand as follows:

"Q. When did you go upon this land, Mr. Williams?

A. Well, sir, I couldn't say the exact date; it was just a little while before we filed.

Q. How long before you filed?

A. I couldn't say exactly. It couldn't have been over a couple of weeks, though, I don't think."

The filing papers show that he filed on the 24th day of February, 1904.

On page 1014 of the record the witness Albert J. Flood testifies:

Q. As a matter of fact, you had not resided there 60 days, had you?

A. No.

Q. You had only stayed overnight there?

A. That's all.

Q. And you don't know whether you stayed on your claim or Walter Williams'?"

A. Oh, yes; I knew the numbers of the land where I was in.

And on page 1015 the witness Flood testifies that he intended to change his homestead filing to a Stone and Timber. That he filed a homestead on it to defeat the State's rights; and on page 1013 the witness testifies, in substance, that he knew it was necessary to make an affidavit that he had established a bona fide residence upon the land, and had resided there for more than sixty days prior to the time the land was subject to entry, in order to defeat the State's rights. His affidavit was false. As Mr. Dwyer had

cruised out this land, and had arranged to locate Timber and Stone entrymen upon it, he did not consider that it was right or just for Skuse, Fitzgerald, Jensen and others to induce entrymen to make a false affidavit, that they had established a bona fide residence upon the land and had resided there for more than sixty days prior to the time the land was subject to entry, in order to defeat the State's rights and also defeat Mr. Dwyer and the many Timber and Stone entrymen who had agreed to pay a fee for being located upon the land.

On page 3056 Mr. Bartlett testifies:

"MR. TANNAHILL—Q. Mr. Bartlett, I show you a list of the homestead filings that were made in the United States Land Office February 24, 1904, and ask you to examine it and tell us how many of those made proof, homestead proof.

A. The only entrymen who made homestead proof were Thomas J. Root, of Orofino, Idaho, for the east half of the northwest quarter, the northwest quarter of the northwest quarter of section 27, the northeast of the northeast of section 28, township 40, north, range 5 east; and Thomas L. Harris, of Orofino, for the south half of the northwest quarter of section 25, and the southeast of the northeast and the northeast of the southeast of section 26, township 37 north, range 3 east.

Q. I will ask you if you have examined your records to ascertain whether or not the entrymen named on this list, named Ferdinand Roos,

Jr., and concluding with the name Anton Wholen, are homestead entrymen who made their entry February 24th, 1904, according to the records of the land office.

A. I haven't examined the records with the view of ascertaining when these entrymen filed, as to whether they made proof or not.

MR. TANNAHILL: This is the one we stipulated on up there, Mr. Gordon, at the time I furnished you the list of the timber and stone entries that Joe Molloy identified. He identified these as the homestead entrymen.

MR. TANNAHILL: We offer in evidence the list of homestead entrymen referred to by the witness, designated as list of homestead filings made in the Lewiston land office February 24, 1904, beginning with the name Ferdinand Roos, Jr., and concluding with the name Anton Wholen.

Said list was thereupon marked by the Reporter as Defendants' Exhibit No. 5A."

This list appears at page 4164 of the record, and aggregates fifty-four homestead entrymen. On cross-examination the witness testifies:

"Q. What became of those entries upon which the proof was not offered? Were they subsequently entered by the same people under timber and stone entries?

A. Some of them were. I have marked those entries that were thus entered with T. & S., and the date the proof was made.

Q. Were they by the same persons?

A. By the same people; yes."

It thus appears that it was not the defendants who were seeking to defraud the State, and who were

seeking to defraud the honest Timber and Stone applicants, but it was Fitzgerald, Skuse and Jensen who induced these people to make a faise affidavit for the purpose of subsequently relinquishing the land and filing Stone and Timber entries thereupon, or relinquishing so that the Timber Trust, by its representative, John J. Skuse, could lay scrip thereupon.

On page 217 of appellant's brief appears a discussion of the records of the Lewiston National Bank in reference to the account of Harvey J. Steffey, and wherein Steffey drew checks upon his account for the payment of the purchase price of the land; and on page 218 of appellant's brief is set forth the record of the bank in relation to the various notes given by Steffey and the condition of his account. If this evidence proves anything, it proves that Steffey drew checks upon his account for the payment of the purchase price of these lands; that from time to time his account was overdrawn; that he gave notes to cover his overdrafts; that when a settlement for the claims was made the money was deposited to Steffey's account, and that he received the full amount of the purchase price named as a consideration in the deeds. There is also a reference to certain notes taken up by Kester and Kettenbach. The evidence

also shows that on December 28, 1907, a check was charged against the account of Kester and Kettenbach for the same amount for which the Steffey notes were given, $3979. With regard to this transaction, Mr. Kettenbach in explanation states that during the period that these loans were made to Steffey, the latter was the owner of two valuable timber claims, and, as such, had a certain rating with the bank for the purpose of securing loans, and his credit was deemed satisfactory to a certain extent. That this was perfectly good business, and that Mr. Kester and Mr. Kettenbach, by virtue of their positions, in the bank, were justified in extending this credit. Mr. Kettenbach explains that after he and Mr. Kester retired from the bank, Mr. Frank W. Kettenbach, the then President, was not altogether satisfied with these Steffey loans, and to satisfy Mr. Frank W. Kettenbach, and to settle the matter up, Mr. Kester and Mr. Kettenbach simply bought up Mr. Steffey's paper, and paid for it, thus fully explaining the showing made by the books. Mr. Kettenbach further explains that Mr. Steffey subsequently sold his claims, thereby destroying his credit and failed to take up all of his paper, and that some of it is still unpaid, and Mr. William F. Kettenbach and Mr. Kester have charged it off to profit and loss.

Evidence of William F. Kettenbach page 3771-3774 of the record.

The incident simply illustrates that Mr. Frank W. Kettenbach's dissatisfaction with the loan was well-founded, and that Mr. Kester and Mr. William F. Kettenbach did a very creditable thing in taking off the bank's hands doubtful paper which as officers of the bank they had sanctioned. As the matter turned out, the bank would have suffered a loss had they not done so. Instead of permitting this to happen, they took the paper themselves and sustained the loss. The incident reflects very favorably on the character and integrity of Mr. William F. Kettenbach and Mr. Kester, and falls far short of bearing out the imputations which no doubt induced counsel for complainant to introduce this evidence.

AFFIDAVITS OF ENTRYMEN IN THE STEFFEY GROUP.

On page 223 of counsel's brief is a discussion under the heading of "Affidavits of Entrymen in the Steffey Group," wherein counsel complains that the defendants obtained affidavits from the entrymen as to the conditions under which they filed upon the land, and also refers to the defendants procuring affidavits

from Charles W. Taylor, Edgar H. Dammorrell, Edward J. Taylor and David S. Bingham. We feel that the officers in charge of the appellant's case are the last ones who should complain concerning the procuring of affidavits from entrymen and entrywomen. We will say, however, that the record does not show that we indicted entrymen, threatened to send them to the penitentiary, nor threatened with indictment those who were not indicted, and after getting affidavits and testimony dismissed indictments. All of the affidavits made for the defendants were made freely and voluntarily, and the defendants have just as much right to procure the affidavits of entrymen, or of anyone else, as has the appellant. There is nothing concerning the procuring of those affidavits which would subject the defendants, or anyone, to criticism, save and except, possibly, Harvey J. Steffey himself.

It seems to be the theory of counsel that the entrymen should not be believed, save and except when they testify favorably to the appellant. If the direct evidence of the entryman who appeared for appellant is to be considered their cross examination should also be considered. The entrymen understood that they had the absolute power of disposition over the lands themselves. They were satisfied

that they could sell to whomsoever they chose, and the mere fact that the defendants, being extensively engaged in the timber business, purchased large numbers of these entries in the open market, merely goes to show that they paid the best price that the entrymen were able to realize, and has certainly little weight, if any, in establishing that prior agreement which is denounced by the statute. In a large majority of cases the defendants did not want to purchase the lands; turned the entrymen away; asked them to endeavor to sell to other timber buyers, and after repeated efforts, being unable to make a sale, the entrymen would return and then sell to the defendants. Timber land at that time was of but little value. It was not considered a profitable investment. The purchaser took chances on the timber being destroyed by fire; took chances on holding it for a number of years before being able to sell it again, and many things entered into consideration which made timber lands unsalable. It was not necessary for the defendants to violate the law in order to purchase timber lands at a very low price. Such lands were offered for sale every day. There was more land offered to the defendants than they were able to buy, and, in view of the conditions existing at the time, it is improbable to believe that

the defendants and all of the entrymen, who are good citizens, are guilty of violating the law, and it is unreasonable to suppose that these men and women who appeared and testified for the appellant —that they had no agreement prior to filing their sworn statement, or at the time they made their final proof, for a sale of their lands,—have sworn falsely.

As to all of the cases where the entrymen are continuing to hold their lands, with no desire or attempt to dispose of them, counsel contents himself by saying that they are holding the same in trust for the defendants Kester, Kettenbach and Dwyer. It is exceedingly easy to make these sweeping assertions, but the Court, we feel, will not be slow to recognize from the evidence that there is nothing to justify them, and that they are unjust, unfair, and without merit. We have yet to find a case which holds that there is anything illegal in purchasing large tracts of timber in the open market, and paying the highest market price therefor, but counsel for appellant, to judge from his brief, would have us believe that the mere acquisition of a large tract of land by the defendants is suspicious *per se,* and starting with that premise, by skillfully misinterpreting little acts and words, by a system of specious

theories and unjustifiable deductions, he would make innocent acts appear wrongful, honest ones as dishonest, and that the whole course of action of the defendants in acquiring these timber lands was characterized by fraud and wrong. Such a frame of mind and feeling of heart must give counsel for appellant but little sympathy with the decision of this Court in *United States vs. Barber Lumber Company*, 194 Fed. 24, wherein Judge Bean, in writing the opinion in the lower court, says:

> "It is just as reasonable and certainly more just to suppose that the entrymen and entrywomen in making the applications to purchase, acted, as they each testified, honestly and in good faith, than it is to conjure up some contrary theory, which necessarily assumes that all the witnesses in this case upon that question perjured themselves on the trial." (172 Fed. 948, at page 955).

An examination of the testimony convinces us that the appellant's case is founded on three principal sources of evidence: (1) The testimony of Clarence W. Robnett, a man whose record convinces that he stoops at nothing to further his own nefarious purposes; a man to whom lying, deceit, false oaths and perjury are but his ready stock in trade if their use but serves his purposes; a self-confessed perjurer and defaulter, and one whose testimonys is certainly entitled to the minimum weight, and especially so

when it becomes apparent that his testimony was unquestionably induced by the hope of immunity, not only under an implied but a direct agreement that he would be released from the penalty of his many crimes, which understanding and agreement was carried out, and from which crimes he was released and pardoned.

(2) The testimony of Harvey J. Steffey, whose evidence is equally unworthy of belief; who admits that he committed perjury, that he committed subornation of perjury, that he violated the land laws, and that he committed other offenses in relation to the acquision of title to timber lands.

(3) The testimony adduced under the persuasive influence of certain special agents through the medium of coercion and the threat of direful consequences if the particular testimony desired were not forthcoming, and the testimony produced by reason of the indictment of various witnesses, and holding those indictments over them until after they had testified and their evidence was made a matter of record, and by threat of indictment in other cases.

Using as a basis the testimony procured through these three sources, counsel for complainant indulges in an elaborate argument based thereon, but his argument is of little value when the fallacious

character of his premises is considered. We submit that the testimony, taken as a whole, falls far short of supporting the premises of counsel's argument, which, starting with false premises is elaborated by a system of gratuitous and unwarranted assumptions, inferences and theories.

A fair sample of the views which counsel for complainant would urge upon this court is that wherein he would urge this court to disregard the testimony given by the Government's own witnesses on their cross-examination, and would have the Court believe that their testimony on cross-examination is unworthy of belief and should not be considered.

To a similar argument advanced in the case of *United States vs. Barber Lumber Company*, 172 Fed. 948, the Court says (at page 962):

> "It is insisted that the entrymen and entrywomen who have testified in this case, although called as witnesses by the Government, were hostile to it, and that their testimony should therefore be disregarded or viewed with suspicion, but there was no particular hostility manifested by any of these witnesses, unless it is due to the fact that their tstimony does not support the averments of the bill. The Government was, of course, not concluded by their testimony, but it cannot insist that they are unworthy of belief or that their testimony should be entirely disregarded and the facts found by the court to be contrary to what these people

> have testified to without some evidence upon which to base such a conclusion. The testimony was competent, and, unless self-contradictory, or inherently improbable, it must necessarily prevail in the absence of contravailing evidence."

Counsel's own argument is an admission of the unsatisfactory nature of the proof adduced by the Government, so counsel lays great stress on little things, and from them, by inferences and conclusions, endeavors to build up a case. But in so doing counsel runs counter to a mass of weighty decisions, all holding that patents of the United States will not be cancelled on any proof short of that proof which is clear, satisfactory and convincing.

We have cited all the leading decisions on this question of cancelling patents, and we would here simply respectfully refer the Court to them, with a feeling of confidence that the proofs shown by the record in this case fall far short of the degree of proof required by those cases to entitle complainant to the relief sought in this proceeding. As stated by Mr. Justice Brewer in *United States vs. Stinson,* 197 U. S. 204, 49 Law Ed. 725, quoting from the Maxwell Land Grant case:

> "It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

We inquire as to whether or not the evidence of Clarence W. Robnett is that class of evidence which commands respect? We have heretofore called the Court's attention to various pages of the record of the evidence of Robnett, especially pages 2353 to 2396 and 2646 to 2651, wherein Robnett refused to answer question on cross-examination, for the reason that his answers might incriminate him. He willingly answered questions for the appellant, and did not claim his privilege, but when we attempted to cross-examine him upon the same matters he claimed his "constitutional privilege," as he called it, and declined to answer. This was sufficient ground for suppressing his deposition, or his evidence, as the same is properly termed, but we did not move against it upon that ground, but contented ourselves with permitting it to remain in the record, calling the Court's attention to the same, and asking the Court what respect this evidence is entitled to, where a complainant in a court of equity in a case requiring clear proof produces as a main ground of recovery a witness who refuses to submit himself to a cross-examination upon the ground that if answers to questions were given they might incriminate him, a witness who embezzled from some of defendants and admits he is contradicting previous

testimony and is doing so with hope of immunity. That is the character of evidence we are required to meet, and upon which the Court is asked to base its decree cancelling the patents to the timber lands set out and described in the bills in equity on file herein, in the face of contrary verdict of a jury and of a contrary decision of the court below.

We feel that the record in this case is now sufficiently voluminous, and we have no desire to further swell its pages by endeavoring to summarize it further in closing. We are satisfied that a careful study of the evidence, as a whole, shows clearly that the charges of the complainant's bills have not been sustained by the proof, and that the theories and desperate efforts of counsel for complainant to show that a crime was committed where in fact there was no offense are not supported by the evidence.

POINTS AND AUTHORITIES.

I.

In order for the complainant to succeed, it is necessary to prove fraud in connection with each and every entry by clear and convincing testimony, and the mere fact of transfer of title before the issuance of patent raises no presumption of unlawfulness or fraud in the original entry.

II.

In a suit by the Government to cancel patents to public lands, the evidence on the part of the Government must be clear, convincing and unequivocal. It must be stronger than beyond a reasonable doubt. This rule has been announced in a number of cases, and the fact that the jury in a criminal case involving the same matters, and based upon the same evidence, has found adversely to the Government, and the trial judge in the civil case has found adversely to the Government, is a very strong indication that the evidence in this particular case is not clear, unequivocal and convincing.

In support of this point we call the Court's attention to the following authorities:

United States vs. Maxwell Land Grant Company, et al., 121 U. S. 325; 30 L .Ed., 949, in which the Court says:

> "While courts of equity have the power to set aside, cancel or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct, under proper circumstances, such mistakes, this can only be done on specific averment of the mistake or fraud, supported by clear and satisfactory proof." (Syllabus 4.)

United States vs. Stone, 69 U. S. 525-527; 17 L. Ed., 765, in which the Court says:

"A patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patents or titles, until it is set aside or annuled by some judicial proceeding."

United States vs. Stinson, 197 U. S. 200-204; 49 L. Ed. 724. At page 725 (L. Ed.) Mr. Justice Brewer says:

"While the Government, like an individual, may maintain an appropriate action to set aside its grants, and recover property of which it has been defrauded, and while laches or limitations do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. 1. The respect due to the patent. The presumption that all proceedings and steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by the proof." (Citing authorities.)

"2. The Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend a prosecution of a like action by an individual."

Quoting from Maxwell Land Grant case (supra): "It should be well understood that only that class of evidence that commands respect, and that amount which produces conviction, shall make such attempt successful." (Citing authorities.)

In *Colorado Coal & Iron Company vs. United States*, 123 U. S. 307, 31 L. Ed. 182, (at p. 186, L. Ed.,) Mr. Justice Matthews, after citing approvingly the Maxwell Land Grant Case (Supra), says:

> "It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish."

The doctrine as laid down in the Maxwell Land Grant case is again cited approvingly in the case of *United States vs. San Jacinto Tin Co.*, 125 U. S. 273, 300; 31 L. Ed. 747, 756, in which the Court says:

> "The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every regularity or even impropriety in the process by which the patent is procured."

United States vs. Marshall Mining Co., 129 U. S. 579, 589; 32 L. Ed. 734, 738.

To the same effect see:

United States vs. Iron-Silver Mining Co., 128 U. S. 673, 678; 32 L. Ed. 571, 573.

United States vs. Des Moines Nav. & R. Co., 142 U. S. 510, 541; 35 L. Ed. 1099, 1108.

In *Files vs. Brown*, 124 Fed. 133, at 139, Judge Sanborn says:

"If there is one proposition in the law regarding the rescission of contracts and the cancellation of muniments of title that is established beyond doubt or cavil, it is that the complainant must establish the essential facts of his cause of action with clearness and certainty, to entitle him to any relief." (Citing authorities.)

"A written instrument cannot be avoided for fraud or mistake unless the evidence of the fraud or mistake is clear, unequivocal and convincing."

Chicago, St. P., M. & O. Ry. Co. v. Bellwith, 83 Fed. 437, 440.

Howland vs. Blake, 97 U. S. 624, 24 L. Ed. 1027, 1028.

"In a suit by the United States to cancel a patent to public land on the ground of fraud, the burden of proof to establish the fraud is on the Government, and the evidence, whether direct and positive, or circumstantial, must be clear, unequivocal and convincing."

United States vs. Mills, 169 Fed. 686 (Syllabus 1).

"The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

United States vs. Stinson, 197 U. S. 200, 49 L. Ed. 724.

The rule as announced in the case of *United States v. Detroit Timber and Lumber Co.*, 124 Fed. 393, 402, AFFIRMED in 131 Fed. 668, REAFFIRMED in 200 U. S. 321, 50 L. Ed. 499:

> "If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is made to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States, under its official seal."
>
> *United States vs. Maxwell Land Grant Co.* (Supra.)

The same doctrine has been approved in the cases of:

United States vs. Clark, 200 U. S. 601, 50 L. Ed. 613.

Chicago & Northwestern R. Co. vs. Wilsox, 116 Fed. 913.

Files vs. Brown, 124 Fed. 133-139.

Fowler vs. Fowler, 135 Fed. 405, 410.

Maslin vs. Noble, 157 Fed. 506, 508.

And also in:

United States vs. Barber Lumber Company, 172 Fed. 948.

AFFIRMED: 194 Fed. 24.

III.

The bill does not allege specifically and in detail in what the fraud consists, and the evidence is far from being of that class commanding respect. It is in no sense clear and unequivocal. The weight of the evidence is not even upon the part of the Government, much less being evenly balanced or in favor of the Government. The chief witness for the Government is Clarence W. Robnett. The evidence of this witness is not the class of evidence which the courts hold must command respect. The evidence, as a whole, is insufficient to establish fraud in connection with any entry, much less in connection with all of the entries.

United States vs. Barber Lumber Co. (Supra).

United States vs. Biggs, 211 U. S. 507; 53 L. Ed. 305.

Williamson vs. United States, 207 U. S. 425; 52 L. Ed. 278.

United States vs. Budd, 144 U. S. 154-173; 36 L. Ed. 384.

IV.

Even if the evidence was of that class which commands respect, and was sufficient to prove fraud on the part of the entrymen, there is no evidence to

prove that any of the defendants were parties to the fraud; the land has all been transferred to innocent purchasers, for value, in due course of business and in good faith, which prevents a decree for the cancellation of the patents.

United States vs. Clark (Supra).

"The rights of a bona fide purchaser from one who has entered timber lands under the Act of Congress of June 3, 1878, which provides that, for a false statement by the entryman, any grant which he may have made shall be void, except in the hands of a bona fide purchaser, are not affected by a subsequent cancellation of the entry for false representations, although at the time of his purchase no patent for the land had been issued."

Lewis vs. Shaw, 70 Fed. 289.

"Where land has been regularly entered under Act June 3, 1878, providing for the sale of lands chiefly valuable for timber and stone, it is not subject to forfeiture in the hands of a bona fide purchaser."

Hawley vs. Diller, 75 Fed. 946.

United States vs. Detroit Lumber Company (Supra).

In *United States vs. California & Oregon Land Co.*, 148 U. S. 31-41; 47 Law Ed., 354, at 359 (L. Ed.) Mr. Justice Brewer says:

"The right, therefore, of this defendant, the California & Oregon Land Company, to avail itself of a plea cannot be doubted; and the plea

which it made in this case, *that of a bona fide purchaser is one favored in the law.* * * * "

In *Stark vs. Starr*, 73 U. S. 402; 18 Law Ed. 925, Mr. Justice Field says (at 929 L. Ed.):

> "The right to a patent once vested is treated by the Government, when dealing with public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

In *United States vs. Stinson*, 197 U. S. 200; 49 L. Ed. 724, at page 725 (Law Ed.), Mr. Justice Brewer says:

> "Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but will also protect the rights and interests of innocent parties." (Citing cases, and citing approvingly from Colorado Coal & Iron Co. vs. U. S., Supra.)

We call the Court's attention to a decision of the Superior Court of Cook County, Illinois, found in Vol. 42 of the National Corporation Reporter of May 25, 1911, in the case of *Pasqualle Schiavone vs. Francesco Schiavone, et al.* This decision was rendered upon exception to the Master's report, and the exceptions were sustained as being against the weight of

the evidence and contrary to law. Section 2 and 3 of the Syllabus are as follows:

(2) "It is the rule in this State that in civil cases when it is necessary to establish facts which show a crime, the same degree of proof is required to sustain the action or defense, as would be required to procure a conviction under an indictment for the same offense. That is, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt."

(3) "When the Complainant has not established his case by the measure of proof required, and where the findings of the Master are not even supported by a preponderance of the evidence, the exceptions to the Master's report must be sustained."

In the body of the decision, the Court holds:

"It is the rule in this state that in a civil case, when it is necessary to establish facts which show a crime, the same degree of proof is required to sustain the action or defense as would be required to procure a conviction under an indictment for the same offense. That is, proof beyond a reasonable doubt. Harbinson vs. Shook, 41 Ill. 141; McConnell vs. Delaware M. S. Ins. Co., 18 Ill. 228; Grimes vs. Hilliary, 150 Ill. 141."

"In Sprague vs. Dodge, 48 Ill. 142, it was held that in civil actions where either party relies upon establishing a criminal offense against the other, the presumption of innocence should only be yielded upon satisfacory evidence of guilt. In the case of Oliver et al. vs. Oliver, 110 Ill. 119, the bill sought to set aside a deed on the ground of forgery, and it was held that the charge of

> forgery was one which the complainant was bound to prove affirmatively by clear and convincing proof before relief could be granted. In People vs. Sullivan, 218 Ill. 437, the Court says: 'The information herein charges the respondent with the commission of a crime. The rule in Illinois, except as modified by statute in actions of slander and libel, is that when a criminal offense is charged in the pleadings, and must be established either to sustain the cause of action, or maintain the defense, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt.' "

While this decision is rendered by a lower court, yet it is so well supported by decisions from the Appellate Courts, and is so sound in its reasoning, that we believe the Court will be satisfied to follow the rule therein announced, and we respectfully submit that the case is very similar to the case at bar. Under the rule laid down in the United States Courts, and under the authorities heretofore cited the proof required to warrant the cancellation of a patent must be clear and satisfactory; must be stronger than beyond a reasonable doubt.

There is no direct evidence of a conspiracy. The Government relies solely upon circumstantial evidence to prove the conspiracy, and the case was submitted to the court entirely upon the presumption and inferences drawn from certain statements and

facts alleged to have been established by the Government, but applying the rule laid down in the case of *United States Fidelity Company vs. Des Moines National Bank*, 145 Fed. 273, the Court says:

> "A theory cannot be said to be established by circumstantial evidence even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither."

Was there then substantial evidence to show a conspiracy or fraud on the part of the defendants? The jury in one case involving the same matters, and the same evidence, found there was not sufficient evidence to warrant a conviction in a criminal case. The court to whom the case was again submitted and tried, and who considered the evidence carefully, as the same applied to each and all of the different entries, found that the evidence was insufficient to warrant a cancellation of the patents. This Court is called upon to review the same evidence, and, although it has never had the opportunity of meeting the witnesses, hearing them testify, as did the court below, and has never had the opportunity of understanding the circumstances surrounding the evidence of each and every witness, is now asked to overturn

the verdict of the jury, the decision of Judge Dietrich, and reverse the case. It may be argued that Judge Dietrich in the case at bar did not hear the witnesses testify, and did not have an opportunity to observe their demeanor upon the stand. To this we reply that Judge Dietrich did have an opportunity of hearing the witness testify, observing their demeanor upon the stand, and of knowing the facts and circumstances surrounding their giving of their evidence in the criminal case (*United States vs. Kettenbach, Kester and Dwyer*), which involved the same transactions, the same evidence, and the same witnesses. We call the Court's attention to the verdict of the jury, appearing at page 4180 of the transcript. This verdict, in connection with the decision and judgment of the lower court, is entitled to due consideration, and should have great weight with this Court in its efforts to reach a fair, just and equitable conclusion.

Respectfully submitted,

GEO. W. TANNAHILL,

Solicitor for the Respondents, William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett and Kittie E. Dwyer.